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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 496

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

ERNEST BROOKS, HAROLD WILSON BROOKS AND WALTER DOUGLAS BROOKS, AS EXECUTORS OF THE WILL OF ERNEST AUGUSTUS BROOKS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 4, 1932
CERTIORARI GRANTED DECEMBER 5, 1932

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1 Before United States Board of Tax Appeals

Docket No. 32401

ERNEST BROOKS, HAROLD WILSON BROOKS, AND WALTER DOUGLAS Brooks, as executors of the estate of Ernest Augustus Brooks, petitioners

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appearances: For taxpayer: James L. Dohr, Esq.; for commissioner, Frank T. Horner, Esq.

Docket entries

1927

Nov. 19. Petition received and filed. Taxpayer notified. (Fee paid.)

" 21. Copy of petition served on general counsel.

1928

Jan. 18. Answer filed by general counsel.

" 20. Copy of answer served on taxpayer. General calendar.

1929

Oct. 9. Hearing set December 5, 1929.

" 28. Application for order to take depositions, filed by taxpayer.

Nov. 4. Order to take depositions of Ernest Brooks, entered.

" 13. Deposition of Ernest Brooks, filed. (1) Copy served by notary.

Dec. 5. Hearing held before Charles M. Trammell, Div. 2, on merits. Depositions filed. Petitioner's brief due in 30 days. Respondent's reply due in 30 days. Petitioner 15 days to reply.

1930

Jan. 6. Brief filed by taxpayer.

" 7. Copy of brief served on general counsel.

" 14. Transcript of hearing of December 5, 1929, filed.

Feb. 6. Reply brief filed by general counsel.

" 19. Reply brief filed by taxpayer.

" 20. Copy of brief served on general counsel.

Dec. 8. Motion for leave to cite decision in case of estate of Rhobie Caldwell Smallman, filed by general counsel. December 9, 1930, granted.

1931

Feb. 5. Findings of fact and opinion rendered, Charles M. Trammell, Div. 2. Judgment will be entered under rule 50.

Mar. 3. Notice of proposed redetermination, filed by general counsel.

Mar. 5. Hearing set April 1, 1931, on motion.
" 6. Consent to settlement, filed by taxpayer (letter).
" 7. Consent to settlement, filed by taxpayer.
" 11. Decision entered, Logan Morris, Div. 14.
Sept. 5. Petition for review to U. S. Circuit Court of Appeals (2) with assignments of error, filed by general counsel.
" 14. Proof of service filed.
2 Oct. 28. Motion for extension to Jan. 4, 1932, to complete and transmit record, filed by general counsel.
" 30. Order of extension to January 4, 1932, to complete and transmit record, entered.

1932

Jan. 2. Motion for extension to March 4, 1932, to complete and transit record, filed by general counsel.
" 4. Order enlarging time to March 4, 1932, to prepare evidence and transmit record *sur* petition for review, entered.
Mar. 3. Præcipe filed. Proof of service thereon.
" 3. Agreed statement of evidence lodged.
" 3. Agreed statement of evidence approved and ordered filed.
" 4. Order enlarging time to April 30, 1932, for transmission and delivery of record *sur* petition for review, entered.

Before United States Board of Tax Appeals

[Titled omitted.]

Petition

Filed Nov. 19, 1927

The above-named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency of October 13th, 1927, symbols MT–ET–C1–NR–12402–FOB, and as a basis of their proceedings allege as follows:

1. The petitioners are the executors of the estate of Ernest Augustus Brooks, with an office at 52 Broadway, New York, N. Y. (c/o Messrs. Greene and Hurd).

2. The notice of deficiency (a copy of which is attached and marked " Exhibit A ") was mailed to the petitioners on October 13th, 1927.

3. The taxes in controversy are estate taxes and for twenty-four thousand eight hundred sixty-five and 88/100 dollars ($24,865.88).

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

A. The Commissioner of Internal Revenue erred in including as part of the gross estate of a nonresident decedent, bonds of foreign corporations and accrued interest thereon in the amount of $24,384.97.

B. The Commissioner of Internal Revenue erred in including as part of the gross estate of a nonresident decedent, bonds of foreign governments and accrued interest thereon in the amount of $55,610.49.

C. The Commissioner of Internal Revenue erred in including as part of the gross estate of a nonresident decedent, bonds of
3 domestic corporations and accrued interest thereon in the amount of $460,315.32.

D. The Commissioner of Internal Revenue erred in including as part of the gross estate of a nonresident decedent, bonds of domestic municipalities and accrued interest thereon in the amount of $15,073.57.

E. The Commissioner of Internal Revenue erred in including as part of the gross estate of a nonresident decedent, stock in foreign corporations in the amount of $50,000.

F. The Commissioner of Internal Revenue erred in including as part of the gross estate of a nonresident decedent, balance on deposit with the banking firm of Lawrence Turnure & Company, New York City, in the amount of $14,517.98.

5. The facts upon which these petitioners rely as a basis of this proceeding are as follows:

A. The petitioners are the duly appointed and qualified executors of the estate of Ernest Brooks, deceased.

B. Ernest Augustus Brooks died on October 31st, 1924, and was at the time of his death a citizen of the Kingdom of Great Britain and a resident of the Republic of Cuba.

C. At the date of his death said Ernest Augustus Brooks owned the following securities which were in a safe-deposit box in New York City, U. S. A.:

(1) Bonds of foreign corporations and accrued interest thereon in the amount of $24,384.97.

(2) Bonds of foreign governments and accrued interest thereon in the amount of $55,610.49.

(3) Bonds of domestic corporations and accrued interest thereon in the amount of $460,315.32.

(4) Bonds of domestic municipalities and accrued interest thereon in the amount of $15,073.57.

(5) Stock in foreign corporations in the amount of $50,000.

D. At the time of his death said Ernest Augustus Brooks had cash on deposit with Lawrence Turnure & Company, New York City, in the amount of $14,517.98.

E. On information and belief that said firm of Lawrence Turnure & Company was a copartnership of persons carrying on a banking business.

F. That said Ernest Augustus Brooks was not engaged in business in the United States at the time of his death.

G. That the entire deficiency of $24,865.88 herein mentioned arises from the errors above set forth by the Commissioner of Internal Revenue.

Wherefore, the petitioners pray that this board may hear the proceeding and enter an order that there is no deficiency in the estate tax of this estate.

JAMES L. DOHR,
Counsel for petitioners.

Office & P. O. address: No. 52 Broadway, Borough of Manhattan, city of New York.

4 *Duly sworn to by Ernest Brooks, jurat omitted in printing.*

Exhibit "A" to petition

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, Oct. 13, 1927.

MT-ET-Cl.-NR-12402-FOB.
District of 3rd New York.
Estate of Ernest Augustus Brooks.
Date of death, October 31, 1924.

ERNEST BROOKS, ET AL.,
Executors, Estate of Ernest Augustus Brooks,
% Green and Hurd, Attorneys,
52 Broadway, New York, New York.

SIRS: The bureau has examined the protest filed on behalf of the above-named estate against the tentative findings set forth in the letter addressed to the executor by this office under date of Dec. 24, 1926. The deficiency hereby determined amounts to $24,865.88, and is fully explained in the attached statement, consisting of two pages, showing the action of the bureau with respect to the protest.

In accordance with the provisions of Title III of the revenue act of 1926, you are allowed 60 days from the date of the mailing of this letter (not counting Sunday as the sixtieth day) within which to file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the said board within the 60-day period prescribed.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed, and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the decision, which has become final, has been made, the unpaid amount of such assessment must be paid upon notice and de-
5 mand from the collector of internal revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals you are re-

quested to execute the enclosed Form 890, waiving (1) your right to file a petition with the United States Board of Tax Appeals and (2) the restrictions on the assessment and collection of such deficiency, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of the Estate Tax Division, Miscellaneous Tax Unit. In the event that you acquiesce in only a part of the determination, the enclosed form of waiver should be executed with respect to the amount of the deficiency to which you agree.

Respectfully,

(Signed) D. H. BLAIR, *Commissioner.*

QR

Enclosures:

Statement.

Waiver—Form 890.

The items involved in your protest are indicated below:

Gross estate	Returned	Tentatively determined	Determined
Schedule B			
Bonds of foreign corporation and accrued interest thereon	$0.00	$24,384.97	$24,384.97
Bonds of foreign governments and accrued interest thereon	.00	55,610.49	55,610.49
Bonds of domestic corporations and accrued interest thereon	.00	460,315.32	460,315.32
Bonds of domestic municipalities and interest thereon	.00	15,073.57	15,073.52
Stock in foreign corporations	.00	50,000.00	50,000.00
Schedule C			
Balance on deposit with Lawrence Turnure & Company	.00	14,517.98	14,517.98

As no adjustment is shown, the following findings are made:

	Returned	Determined
Gross estate, wherever situated	$784,887.25	$792,470.39
Gross estate in the United States	34,021.75	654,137.96
Deductions	501.51	9,119.98
Net estate within the United States	33,520.24	645,017.98
Tax returned	335.20	25,201.08
Deficiency		24,865.88

On account of payment of State inheritance taxes there is allowable against the Federal estate tax a credit of not to exceed 25 per centum thereof. Accordingly, the portion of the deficiency proposed for assessment is $24,732.76, together with interest thereon at the rate of 6 per centum per annum from one year after the decedent's death to the date of assessment, or to the 30th day after the filing of waiver, Form 890, whichever is the earlier.

6 Before United States Board of Tax Appeals

Answer

Filed Jan. 18, 1928

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, general counsel, Bureau of Internal Revenue, in answer to the petition of the above-named taxpayers, admits and denies as follows:

1. Admits the allegations contained in the paragraph of the petition numbered 1.

2. Admits the allegations contained in the paragraph of the petition numbered 2.

3. Admits so much of the paragraph of the petition numbered 3 as alleges that the taxes in controversy are estate taxes, and denies all other allegations contained in the paragraph of the petition numbered 3.

4. Denies that the commissioner, in determining the deficiency tax, committed error, as alleged in the paragraph of the petition numbered 4.

5. A and B. Admits the allegations contained in subdivisions A and B of the paragraph of the petition numbered 5.

5. C. Admits so much of subdivision C of the paragraph of the petition numbered 5 as alleges that at the date of his death, said Ernest Augustus Brooks owned securities of the value and descriptions stated in said subdivision C, which were in New York City, U. S. A., and denies all other allegations contained in said subdivision C of the paragraph of the petition numbered 5.

5. D. Admits the allegations contained in subdivision D of the paragraph of the petition numbered 5.

5. E, F, and G. Denies the allegations contained in subdivisions E, F, and G of the paragraph of the petition numbered 5.

6. Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore it is respectfully prayed that the determination of the commissioner be approved.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Of counsel:

FRANK T. HORNER,
Special Attorney, Bureau of Internal Revenue.

FTH/y.
1/13/28.

(Indorsed:) A true Copy: Teste. B. D. Gamble, Clerk U. S. Board of Tax Appeals. [Seal.]

Before United States Board of Tax Appeals

ERNEST BROOKS, HAROLD WILSON BROOKS, AND WALTER DOUGLAS BROOKS, Executors of the Estate of Ernest Augustus Brooks, petitioners

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 32401. Promulgated February 5, 1931

Findings of fact and opinion

The decedent died on October 31, 1924, a citizen of Great Britain and a resident of Cuba. At the time of his death he was not engaged in business in the United States, but was possessed of certain intangible property consisting of stock in a foreign corporation and bonds of foreign corporations, foreign governments, domestic corporations, and of a domestic municipality, the paper evidences of which were located in New York City. Said securities were deposited in part with decedent's son and in part with Lawrence Turnure & Company for the sale purpose of having the income collected and deposited to the credit of the decedent.

Held, that, with respect to said intangibles, the common-law maxim mobilia sequuntur personam applies, and that said securities may not, under section 303 (b) of the 1924 revenue act, be included in determining the value of that part of the decedent's gross estate which at the time of his death was situated in the United States.

James L. Dohr, Esq., for the petitioners.

Frank T. Horner, Esq., for the respondent.

This is a proceeding for the redetermination of a deficiency in estate tax in the amount of $24,865.88, asserted against the petitioners as executors of the estate of Ernest Augustus Brooks, who died on October 31, 1924. The issues are:

(1) Whether or not in determining the value of the net estate, which is the basis for computing the tax, the value of the following property of the decedent, who was a nonresident alien not engaged in business in the United States at the time of his death, should be included in determining the value of that part of his gross estate which at the time of his death was situated in the United States, namely, (a) shares of stock in a foreign corporation, (b) bonds of foreign corporations, (c) bonds of foreign governments, (d) bonds of domestic corporations, and (e) bonds of a domestic municipality, the paper evidences of such securities being located within the United States at the time of the decedent's death; and

(2) Whether or not the amount of $14,517.98, deposited by or for the decedent with the firm of Lawrence Turnure & Company, New York, N. Y., constituted "moneys deposited with any person carrying on the banking business, by or for a nonresident decedent who was not engaged in business in the United States at the time of his death."

8 *Findings of fact*

The petitioners are the duly appointed and qualified executors of the estate of Ernest Augustus Brooks, deceased, with an office at 52 Broadway, New York, N. Y.

The decedent died on October 31, 1924, and at the time of his death was a citizen of the Kingdom of Great Britain and a resident of the Republic of Cuba. At the time of his death the decedent was not engaged in business in the United States.

At the time of his death the decedent owned securities, which were in New York City, U. S. A., as follows:

(a) Bonds of foreign corporations and accrued interest thereon in the amount of	$24,384.97
(b) Bonds of foreign governments and accrued interest thereon in the amount of	55,610.49
(c) Bonds of domestic corporations and accrued interest thereon in the amount of	460,315.32
(d) Bonds of a domestic municipality and accrued interest thereon in the amount of	15,073.57
(e) Stock in a foreign corporation in the amount of	50,000.00

At the time of his death the decedent also had cash on deposit with Lawrence Turnure & Company, New York City, in the amount of $14,517.98.

The bonds of foreign corporations and accrued interest thereon, aggregating a value of $24,384.97, were as follows:

(1) $20,000 Canadian National Ry. Co. 30-yr. 4½% coupon gold bonds, due 1954	$19,150.00	
Accrued interest thereon		114.36
(2) $5,000 Canada Southern Ry. Co. 1st consolidated mortgage guar. 5% bonds, due 1963	5,100.00	
Accrued interest thereon		20.61
Total		24,384.97

The bonds of foreign governments and accrued interest thereon, aggregating a value of $55,610.49, were as follows:

(3) $3,000 Dominican Republic Customs Adm. sinking fund 5% coupon bonds of 1958	$3,030.00	
Accrued interest thereon		37.91
(4) $4,000 Kingdom of Belgium 26-yr. external sinking fund 7½% coupon bonds, due 1945	4,390.00	
Accrued interest thereon		124.59
(5) $3,000 Kingdom of Sweden 20-yr. 6% external coupon bonds of 1939	3,131.25	
Accrued interest thereon		67.87
(6) $10,000 Kingdom of Norway 20-yr. 6% external coupon bonds, due 1944	9,850.00	
Accrued interest thereon		148.37

(7) $7,000 Swiss Confederation 20-yr. sinking fund 8% bonds, due 1940	$8,032.50
Accrued interest thereon	185.66
(8) $5,000 French Government 20-yr. external sinking fund 8% bonds, due 1945	4,237.50
Accrued interest thereon	50.83
(9) $7,000 Kingdom of Norway external sinking fund 8% bonds due 1940	7,866.25
Accrued interest thereon	46.16
(10) $7,000 Kingdom of Denmark external sinking fund & refunding 8% bonds, due 1945	7,743.75
Accrued interest thereon	24.62
9 (11) $5,000 Kingdom of Belgium 25-yr. external sinking fund 7½% bonds, due 1945	5,487.50
Accrued interest thereon	155.73
Total	55,610.49

The bonds of domestic corporations and accrued interest thereon, aggregating a value of $460,315.32, were as follows:

(12) $50,000 Michigan Central R. R. Co. (Air Line) 1st mtge. 4% coupon bonds, due 1940	$45,000.00
Accrued interest thereon	693.04
(13) $5,000 Tennessee Coal & Iron and R. R. Co. gen. mtge. 5% coupon bonds, due 1925	5,087.50
Accrued interest thereon	82.88
(14) $25,000 Illinois Central R. R. Co. 1st mtge. 4% coupon gold bond, due 1951	23,093.75
Accrued interest thereon	331.54
(15) $25,000 Union Pacific R. R. Co. 1st mtge. 4% coupon bonds, due 1947	23,125.00
Accrued interest thereon	331.54
(16) $20,000 Chesapeake & Ohio Ry. Co. 1st cons. mtge. 4% coupon bonds, due 1989	16,925.00
Accrued interest thereon	265.22
(17) $25,000 Chicago, Rock Island & Pacific Ry. Co. gen. mtge. coupon 4% bonds, 1988	20,812.50
Accrued interest thereon	331.54
(18) $10,000 Erie Railroad Co. 1st cons. gen. prior lien 4% coupon bonds, due 1996	7,050.00
Accrued interest thereon	132.61
(19) $5,400 Reading Company gen. & ref. mtge. series "A" 4½% coupon bonds, due 1997	5,076.00
Accrued interest thereon	80.56
(20) $2,700 Philadelphia & Reading Coal & Iron Company 5% coupon rfdg. mortgage bonds, due 1973	2,733.75
Accrued interest thereon	41.43
(21) $35,000 Northern Pacific R. R. Co. prior lien 4% coupon bonds, due 1997	31,018.75
Accrued interest thereon	114.13
(22) $25,000 Pacific R. R. of Missouri 1st external mtge. 4% coupon bonds, due 1938	22,562.50
Accrued interest thereon	247.28
(23) $25,000 Central Pacific Railway Co. 1st & ref. mtge. 4% coupon bonds, due 1949	21,937.50
Accrued interest thereon	247.28
(24) $5,000 New York Central & Hudson River R. R. Co. 3½% coupon bonds, due 1998	3,850.00
Accrued interest thereon	43.27
(25) $25,000 Atlantic Coast Line R. R. Co. 1st cons. mtge. 4% coupon bonds, due 1952	22,875.00
Accrued interest thereon	165.75
(26) $49,000 New York, Chicago & St. Louis R. R. Co. 1st mtge. 4% coupon bonds, due 1927	45,325.00
Accrued interest thereon	161.54

(27) $25,000 Atchison, Topeka & Santa Fe gen. mtge. 4% coupon bonds, due 1995	$22,562.50
Accrued interest thereon	82.42
(28) $25,000 St. Louis, Iron Mountain & Southern R. R. Co. gen. consol. mtge. 4% coupon bonds, due 1931	25,031.25
Accrued interest thereon	103.63
(29) $5,000 Baltimore & Ohio 1st mtge. 4% coupon bonds, due 1948	4,400.00
Accrued interest thereon	16.48
(30) $3,000 Peoria & Eastern Ry. Co. 1st cons. mtge. 4% coupon bonds, due 1940	2,373.75
Accrued interest thereon	9.89
10 (31) $10,000 American Smelting & Refining Co. 1st mtge. series "A" 5% coupon bonds, due 1947	9,625.00
Accrued interest thereon	41.20
(32) $25,000 Norfolk & Western R. R. 1st cons. mtge. 4% coupon bonds, due 1996	22,406.25
Accrued interest thereon	82.42
(33) $10,000 Chicago & Northwestern R. R. Co. gen. mtge. 3½% coupon bonds, due 1987	7,500.00
Accrued interest thereon	174.04
(34) $400 Evansville, Indianapolis & Terre Haute R. R. Co. coupon 1st mtge. 7% bonds, due 1950	405.00
Accrued interest thereon	13.92
(35) $24,000 Lake Shore & Michigan Southern R. R. Co. 3½% coupon bonds, due 1997	18,900.00
Accrued interest thereon	348.85
(36) $5,000 Oregon-Washington Railroad & Navigation Company cons. mtge. 4% coupon bonds, due 1946	4,400.00
Accrued interest thereon	83.05
(37) $300 Cleveland, Cincinnati, Chicago & St. Louis R. R. Co. ref. & imp. 6% coupon bonds, due 1941	315.00
Accrued interest thereon	5.97
(38) $5,000 Missouri-Kansas-Texas R. R. Co. prior lien mtge. series "B" 4% coupon bonds, due 1962	3,575.00
Accrued interest thereon	66.30
(39) $5,000 Missouri-Kansas-Texas R. R. Co. prior lien mtge. series "A" 5% coupon bonds, due 1962	4,337.50
Accrued interest thereon	82.88
(40) $1,333.50 Reading Company gen. & ref. mtge. series "A" 4½% coupon bonds, due 1997	1,253.49
Accrued interest thereon	19.99
(41) $666.67 Philadelphia & Reading Coal & Iron Co. ref. 5% bonds, due 1973	675.20
Accrued interest thereon	11.05
(42) $5,000 Interborough Rapid Transit Company 5% 1st ref. bonds, due 1966	3,331.25
Accrued interest thereon	82.88
(43) $3,000 Southern R. R. Co. 1st cons. gen. mtge. 5% bonds, due 1994	3,030.00
Accrued interest thereon	49.73
(44) $3,000 Great Northern Ry. Co. 1st & ref. mtge. series "A" 4½% bonds, due 1961	2,737.50
Accrued interest thereon	42.28
(45) $4,000 Baltimore & Ohio 1st mtge, 50-year 4% bonds, due 1948	3,520.00
Accrued interest thereon	13.18
(46) $4,000 New York Chicago & St. Louis 1st mtge. 4% bonds, due 1937	3,700.00
Accrued interest thereon	13.18
(47) $5,000 South & North Alabama R. R. Co. gen. cons. 50-yr. 5% bonds, due 1966	5,225.00
Accrued interest thereon	20.61
(48) $2,000 Indiana Steel Corporation 1st mtge. 5% bonds, due 1952	2,055.00
Accrued interest thereon	49.73

(49) $3,000 Cleveland Short Line R. R. Co. 1st guar. mtg. 4½% bonds, due 1961	$2,868.75
Accrued interest thereon	11.13
(50) $5,000 Oregon Short Line R. R. Co. guar. ref. mtg. 4% bonds, due 1929	4,868.75
Accrued interest thereon	83.06
Total	460,315.32

11 The bonds of domestic municipality and accrued interest thereon, aggregated a value of $15,073.57, were as follows:

(51) $15,000 city of New York registered 4% corporate stock of 1956	$14,775.00
Accrued interest thereon	298.57
Total	15,073.57

The shares of capital stock in a foreign corporation aggregating a value of $50,000, consisted of—

(52) 666 shares of capital stock of the Central Romelie S. A. Cuba Joint Stock Company of Guantanamo, Cuba, a corporation organized under the laws of the Republic of Cuba	$50,000.00

Of the foregoing securities, there were in the possession of the decedent's son, Ernest Brooks, in New York City, at the time of the decedent's death, the items numbered as follows: 2, 7, 8, 9, 10, 11, 40–43, 44, 45–47, 48, 49, 50, 52. These securities were not pledged and were not held as security for any indebtedness. The said son of the decedent had possession of the securities, consisting of a stock certificate and bonds, for the purpose of collecting the income therefrom and depositing same to the credit of his father in a New York bank.

The remainder of the securities above described, consisting of the following items, were in the possession of Lawrence Turnure & Company, in New York City: 1, 3, 4, 5, 6, 12–23, 24–32, 33–36, 37–39, 51. Said securities were not pledged to nor hypothecated with said company and were not held has security for any indebtedness. Said company collected the income from the securities of the decedent so in its possession and placed same to the decedent's credit in a drawing account, against which the decedent from time to time drew checks. Said company made a charge for the services rendered in this connection.

The foregoing securities, at the values stated, were included by the respondent in determining the value of that part of the gross estate of the decedent which at the time of his death was situated in the United States.

The balance of $14,517.98, which the decedent at the time of his death had on deposit with Lawrence Turnure & Company, in New York City, was included by the respondent in the gross estate of the decedent.

Opinion

TRAMMELL: The first issue for consideration in this proceeding is whether or not the value of intangible personal property of a nonresident alien decedent, comprising stock in a foreign corporation and bonds of foreign governments, foreign corporations, domestic corporations, and of a domestic municipality, should, for the purpose of the Federal estate tax be included under the facts of this case as a part of the decedent's gross estate, which at the time of his death was "*situated in the United States.*"

The decedent died on October 31, 1924, a resident of Cuba and a citizen of Great Britain. At the time of death he was possessed of the securities described in detail in our findings of fact and 12 referred to above. The decedent was not engaged in business in the United States, and while the stock certificates and bonds in question were located in New York City, they were not hypothecated or pledged as security for any indebtedness. The securities were not a part of any business localized in the United States.

The pertinent provisions of the revenue act of 1924 applicable to this proceeding are as follows:

"SEC. 301. (a) In lieu of the tax imposed by Title IV of the revenue act of 1921, a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 303) is hereby imposed upon the transfer of the net estate of every decedent dying after the enactment of this act, whether a resident or nonresident of the United States: * * *

"SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

"(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate: * * *

"SEC. 303. For the purpose of the tax the value of the net estate shall be determined—

* * * * * * *

"(b) In the case of a nonresident, by deducting from the value of that part of his gross estate which at the time of his death is situated in the United States"—

(Specified deductions omitted as not material here.)

* * * * * * *

"(d) For the purpose of Part I of this title, stock in a domestic corporation owned and held by a nonresident decedent shall be deemed property within the United States."

The revenue act of 1924, which was enacted June 2, 1924, prior to the death of the decedent, in section 301 (a), supra, imposes a tax upon the transfer of the net estate of every decedent dying after the enactment of said act, whether a resident or nonresident of the

United States, and in section 302 provides that the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, with certain limitations not here material. Subdivision (a) of section 303 provides the method of determining the value of the net estate in the case of a resident with which we are not here concerned. And subdivision (b) of said section provides that in the case of a nonresident the value of the net estate of the decedent shall be determined by making certain specified deductions "from the value of that part of his gross estate which at the time of his death is situated in the United States."

It is clear that section 303 (b) is a direct limitation upon the provisions of section 302 in so far as section 302 is applicable to the estate of a nonresident decedent, and since the tax is in all cases computed upon the value of the net estate, and since in the case of a nonresident decedent the net estate must be determined upon the basis of that part of the gross estate which is situated in the United States at the time of the decedent's death, the first issue in this
13 proceeding resolves itself into the question whether the securities owned by this decedent may, under the circumstances indicated, be considered for the purpose of the estate tax as property "situated in the United States" at the time of his death.

The issue here presented does not involve any question of the power of Congress to impose a transfer or estate tax measured by the value of property of the kinds owned by this defendant, but the question is rather whether Congress has in fact done so. Congress has clearly indicated its intention that the tax shall be determined, in the case of a nonresident decedent, only on the basis of "the value of that part of his gross estate which at the time of his death is situated in the United States." We shall, therefore, restrict our consideration of the issue to the question whether the decedent's securities were property which, at the time of his death, was "situated in the United States."

The respondent has included the value of the decedent's securities as a part of his gross estate because of the fact that the stock certificates and bonds were located in New York City at the date of his death. This position of the respondent rests upon the theory that the stock certificates were something more than mere evidences of the decedent's ownership of an interest in the corporations, and that the bonds were likewise something more than mere evidences of debt; in effect, that the property rights themselves were inseparable from and were constituted by the documents, and had a situs where the documents were located. If this view is sound, as contended by the respondent, it would follow that since the instruments were located in New York City, the securities were property "situated in the United States."

This doctrine has been the subject of judicial consideration in numerous cases, and there is marked conflict in the reported decisions. The principle has been accepted by some courts and rejected

by others. The Supreme Court of the United States, in its early decisions, took a contrary view; later the principle was approved and still later rejected.

In Blackstone v. Miller, 188 U. S. 189 (January, 1903), the court said:

"Bonds and negotiable instruments are more than merely evidences of debt. The debt is inseparable from the paper which declarse and constitutes it, by a tradition which comes down from more archaic conditions."

In De Ganay v. Lederer, 250 U. S. 376 (June, 1919), the court cited with approval its former decision in Blackstone v. Miller, and said:

"To the general understanding and with the common meaning usually attached to such descriptive terms, bonds, mortgages, and certificates of stock are regarded as property. By State and Federal statutes they are often treated as property, not as mere evidences of the interest which they represent."

The Court of Appeals of New York, in People ex rel. Jefferson v. Smith, 88 N. Y. 576 (cited with approval and quoted by the Supreme Court in the De Ganay case), treated instruments of the kind here involved as tangible property, saying:

"It is clear from the statutes referred to and the authorities cited and from the understanding of business men in commercial transactions, as well as of jurists and legislators, that mortgages,
14 bonds, bills and notes have for many purposes come to be regarded as property and not as the mere evidences of debts, and that they may thus have a situs at the place where they are found like other visible, tangible chattels."

The opposite view, that the exclusive situs of the property in debts is the domicile of the creditors, irrespective of the location of the bonds or paper evidences, was adopted by the Supreme Court in Railroad Company v. Pennsylvania, reported under the title "State Tax on Foreign-Held Bonds," 15 Wall. 300, decided in 1872. In that case the court in its opinion said (p. 320):

"All the property there can be in the nature of things in debts of corporations, belongs to the creditors, to whom they are payable, and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due. This principle might be stated in many different ways, and supported by citations from numerous adjudications, but no number of authorities, and no forms of expression could add anything to its obvious truth, which is recognized upon its simple statement."

Substantially the same views were expressed by the court in Kirtland v. Hotchkiss, 100 U. S. 491 (October, 1879), wherein the court cited with approval State Tax on Foreign-Held Bonds, supra, and said:

"That debt, although a species of intangible property, may, for purposes of taxation, if not for all others, be regarded as situated at the domicile of the creditor. It is none the less property because

its amount and maturity are set forth in a bond. That bond, wherever actually held or deposited, is only evidence of the debt, and if destroyed, the debt—the right to demand payment of the money loaned, with the stipulated interest—remains. Nor is the debt for purposes of taxation, affected by the fact that it is secured by mortgage upon real estate situated in Illinois. The mortgage is but a security for the debt * * *."

The view that intangibles, such as debts evidenced by bonds or otherwise, have an exclusive situs for the purpose of taxation at the domicile of the creditor or owner, as expressed in State Tax on Foreign-Held Bonds, supra (1872), and in Kirtland v. Hotchkiss, supra (1879), was plainly departed from by the court in the later case of Blackstone v. Miller, supra (1903), where the court upheld the right of the State of New York to levy a tax on the transfer by will of certain debts due from residents of New York to the decedent Blackstone, who died domiciled in Illinois. The State of New York had by legislative act created a situs for such property not where the paper evidences of the debt were located or where the creditors were domiciled, but at the place where the debtors were domiciled. The court sustained the tax without regard to the fact that another State might have had the right to tax at the place the property was situated or where the creditor was domiciled, and this opinion of the court for the first time lent support to the doctrine that intangible property had a situs where the paper evidences thereof were located.

Blackstone v. Miller was cited and followed by the court in approving opinions as late as June, 1929 (see De Ganay v. Lederer, supra). However, the doctrine that intangibles may have a taxable situs apart from the domicile of the owner because of the presence of the paper evidences was definitely abandoned and the decision in the Blackstone case overruled in Farmer's Loan and Trust Co. v. Minnesota, 280 U. S. 204 (January, 1930), where the court said:

"Blackstone v. Miller, supra, and certain approving opinions lend support to the doctrine that ordinary choses in action are subject to taxation both at the debtor's domicile and at the domicile of the creditor; that two States may tax on different and more or less inconsistent principles the same testamentary transfer of such property without conflict with the fourteenth amendment * * *. Having considered the supporting arguments in the light of our more recent opinions, we are compelled to declare it untenable. Blackstone v. Miller, no longer can be regarded as a correct exposition of existing law; and to prevent misunderstanding it is definitely overruled."

The specific question whether the mere presence of the paper evidences of debts constitutes a tax situs of the property at the place where such paper evidences are found was considered by the court in Buck v. Beach, 206 U. S. 392. In that case, the State of Indiana

sought to tax certain notes which were given and were payable in the State of Ohio, by residents of Ohio to a nonresident of Indiana, solely because the notes or paper evidences of the debts were present in Indiana. The court held that the notes did not constitute property located in the State of Indiana and accordingly was not taxable by that State, saying:

"If the facts in this case constituted the debts evidenced by the Ohio notes property in the jurisdiction of the State of Indiana at the time when such taxes were imposed, then the tax is valid * * *.

"The sole question then for this court is whether the mere presence of the notes in Indiana constituted the debts of which the notes were the written evidence, property within the jurisdiction of that State, so that such debts could be therein taxed.

* * * * * * *

"We can not assent to the doctrine that the mere presence of evidences of debt, such as these notes, under the circumstances already stated, amounts to the presence of property within the State for taxation."

In Blodgett v. Silberman, 277 U. S. 1, 9, 14 (October, 1927), the court approved the maxim "mobilia sequuntur personam" and applied the principle that the location of the paper evidences of intangibles was not material in determining the taxable situs of such property. It was held in that case that the State of the decedent's domicile might impose a succession tax on the transfer of his intangible property by will or inheritance, even though the evidences of such property were outside of the State at the time of his death. In that connection the court said:

"At common law the maxim 'mobilia sequuntur personam' applied. There has been discussion and criticism of the application and enforcement of that maxim, but it is so fixed in the common law of this country and of England, in so far as it relates to intangible property, including choses in action, without regard to whether they are evidenced in writing or otherwise and whether the papers evidencing the same are found in the State of the domicile or elsewhere, and it is so fully sustained by cases in this
16 and other courts, that it must be treated as settled in this jurisdiction whether it approve itself to legal philosophic test or not.

* * * * * * *

"The question here is whether bonds, unlike other choses in action, may have a situs different from the owner's domicil such as will render this transfer taxable in the State of that situs and in only that State. We think that bonds are not thus distinguishable from other choses in action. It is not enough to show that the written or printed evidence of ownership may, by the law of the State in which they are physically present, be permitted to be taken in execution or dealt with as reaching that of which they are evidence, even without the presence of the owner. While bonds are so

treated, they are, nevertheless, in their essence only evidences of debt. The Supreme Court of Errors expressly admits that they are choses in action. Whatever incidental qualities may be added by usage of business or by statutory provision, this characteristic remains and shows itself by the fact that their destruction physically will not destroy the debt which they represent. They are representative and not the thing itself."

It appears now to be settled beyond controversy in the Federal jurisdiction that intangibles, except where they have become part of a localized business in another jurisdiction, have an exclusive situs for the purpose of taxation at the domicile of the owner, without regard to where the paper evidences of such property may be found, and this is the present rule not only with respect to excise or transfer taxes, but also with respect to direct property taxes. Buck v. Beach, supra.

The doctrine presently approved by the Supreme Court, at least in so far as it involves the taxing power of the States under the Fourteenth Amendment, is clearly stated in Farmers' Loan and Trust Co. v. Minnesota, supra (decided January, 1930), as follows:

"While debts have no actual territorial situs we have ruled that a State may properly apply the rule mobilia sequuntur personam and treat them as localized at the creditor's domicile for taxation purposes. Tangibles with permanent situs therein, and their testamentary transfer, may be taxed only by the State where they are found. And, we think, the general reasons declared sufficient to inhibit taxation of them by two States apply under present circumstances with no less force to intangibles with taxable situs imposed by due application of the legal fiction.

* * * * * * *

"Taxation is an intensely practical matter and laws in respect of it should be construed and applied with a view of avoiding, so far as possible, unjust and oppressive consequences. We have determined that in general intangibles may be properly taxed at the domicile of their owner and we can find no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles. The difference between the two things, although obvious enough, seems insufficient to justify the harsh and oppressive discrimination against intangibles contended for on behalf of Minnesota."

The views of the Supreme Court are further stated and amplified in its latest decision on this question in Baldwin v. Missouri,
17 281 U. S. 586 (decided May 26, 1930), wherein the court cited with approval and quoted from State Tax on Foreign Held Bonds, supra, Kirtland v. Hotchkiss, supra, Blodgett v. Silberman, supra, and Farmers' Loan and Trust Co. v. Minnesota, supra. In the Baldwin case the State of Missouri had levied an inheritance tax measured by the value of certain intangible property in the form of deposits in Missouri banks, United States bonds, and promissory

notes most of which were executed by citizens of Missouri and secured by liens upon lands lying therein, but all of which intangibles were evidenced by documents located in Missouri, while the owner decedent was a resident of Illinois. The court held that the property was not situated within the jurisdiction of Missouri, and that said State did not have the power to tax its transfer. In its opinion, the court said:

"The challenged judgment rests upon the broad theory that a State may lay succession or inheritance taxes measured by the value of any deposits in local banks passing from a nonresident decedent; also upon the value of bonds issued by the United States and promissory notes executed by individual citizens of the State, when devised by such nonresident, if these bonds or notes happen to be found within the confines of the State when death occurs. The cause was decided below prior to our determination of Farmers' Loan and Trust Co. v. Minnesota, 280 U. S. 204. Blackstone v. Miller, 188 U. S. 189, was cited in support of the conclusion reached. Considering Farmers' Loan and Trust Co. v. Minnesota, and previous opinions there referred to, the theory upon which the court below proceeded is untenable and its judgment must be reversed.

"Ordinarily, bank deposits are mere credits and for purposes of ad valorem taxation have situs at the domicile of the creditor only. The same general rule applies to negotiable bonds and notes, whether secured by liens or real estate or otherwise.

* * * * * * *

"We find nothing to exempt the effort to tax the transfer of the deposits in Missouri banks from the principle applied in Farmers' Loan & Trust Co. v. Minnesota, supra. So far as disclosed by the record, the situs of the credit was in Illinois where the depositor had her domicile. There the property interest in the credit passed under her will; and there the transfer was actually taxed. This passing was properly taxable at that place and not otherwise.

"The bonds and notes, although physically within Missouri, under our former opinions were choses in action with situs at the domicile of the creditor. At that point they, too, passed from the dead to the living, and there this transfer was actually taxed. As they were not within Missouri for taxation purposes the transfer was not subject to her power. Rhode Island Trust Co. v. Doughton, 270 U. S. 69."

At least so far as concerns the power of the States to tax without conflict with the fourteenth amendment, the foregoing decisions of the Supreme Court appear definitely and unmistakably to establish two principles, namely, first the general principle that intangibles, such as we have here, follow the person and have a situs for the purposes of taxation only at the domicile of the owner; and, second, the specific principle that the mere presence of the instruments or paper evidences does not establish a taxable situs at the place
18 where they are found in respect of the property rights which they represent. And, as we have shown, these principles are

applied alike in the case of State excise or transfer taxes and in the case of direct property taxes.

Should a different rule be applied in the case of Federal taxation involving a nonresident alien decedent? Can intangible property consistently be said to have a certain situs for the purposes of State taxation and another and different situs for the purposes of Federal taxation? No such distinction is indicated by the decisions of the Supreme Court. The statute here involved did not undertake to create any situs for the property, other than at the place where "situated." If it were situated at the domicile of the owner it was not "situated in the United States." We can rely upon the court decisions setting forth what is meant by "situated" and where intangible property is situated. It is clear that the fourteenth amendment to the Constitution has no effect whatever in so far as the question now before us is concerned, but we are concerned with the rule laid down by the Supreme Court as to the situs of intangible property. Its situs is the foundation of the tax by the States under the fourteenth amendment decisions. In deciding those cases the court was called upon to decide where the property was situated. If the situs follows the domicile of the owner and is situated as that place that principle affects the decision of the case before us.

De Ganay v. Lederer, supra, parallels in many respects the case now before us, the principal difference being that that case involved a Federal income tax and the present case involves a Federal estate tax. Each case arose under a Federal taxing statute, and in nowise involves the power of the several States to tax under the fourteenth amendment. Each case concerns intangible property, namely, corporate securities owned by a nonresident alien, the certificates or paper evidences of which were located in the United States; and the question in each case, in the last analysis, is whether such intangibles, for the purpose of Federal taxation, constitute property owned or situated in the United States.

In the De Ganay case the court cited with approval and quoted Blackstone v. Miller, supra, and to the extent it lends support to the doctrine that bonds and negotiable instruments are more than merely evidences of debt and give to the property rights themselves a tax situs where the instruments are found, this decision must be regarded as one of the "approving opinions" overruled in Farmers' Loan & Trust Co. v. Minnesota, supra. It should be noted, however, that the conclusion reached in the De Ganay case rests in large part aside from the principle above set out, on the proposition that the securities in question had acquired a business situs in Pennsylvania, and accordingly held the income was from sources within the United States, which situation is not presented in the instant case. In any event, the point in the De Ganay case which is of particular importance here is the fact that, in deciding the question of the situs of intangibles for the purposes of Federal taxation, the court made no attempt to distinguish its prior decisions involving the power of the States to tax such property under the fourteenth amendment, but on

the contrary adopted the same reasoning, the same doctrine, the same principles as were applied in the State cases under the fourteenth amendment.

19 In the case of Turner, Executor, v. McCuen, decided by the United States District Court for the District of Vermont August 30, 1930, the collector had collected an estate tax on money deposited by a resident of Canada in a bank in Vermont. The court discussed only the question as to whether the decedent was "engaged in business in the United States." Apparently the court did not consider it worth while even to discuss the question whether otherwise the property might have been considered situated in the United States, but decided that the estate tax paid should be refunded. However, if bank deposits in the United States of a nonresident decedent be held to be property situated in the United States, the decision of the court was erroneous. While the court did not refer to the Baldwin case and the Minnesota case, supra, the decision is in accord with the reasoning of those cases. The doctrine of those two cases was reaffirmed by the Supreme Court as late as November 24, 1930, in the case of Beidler v. South Carolina Tax Commission (not yet reported), in so far as indebtedness was concerned. In that case the court had no occasion to decide the question as it related to corporate stocks. They were taxed in South Carolina, where the corporations were organized, and this question was not presented to the court. It seems clear that the language of prior decisions is broad enough to include the stocks of foreign corporations here involved. Corporate stocks were included in the De Ganay case, supra, and were classified by the Supreme Court in the same way as notes and bonds. In the case of Rhode Island Hospital Trust Co. v. Doughton, 270 U. S. 69 (1926), the Supreme Court said: "In the matter of intangibles, like choses in action, shares of stock, and bonds, the situs of which is with the owner, a transfer tax, of course, may be properly levied by the State of which he resides * * *." The court held that North Carolina could not tax the transfer of the stock in a New Jersey corporation doing business in North Carolina, where two-thirds of the property was located. Shares of stock were involved in the Silberman case, supra, where the court applied the same rule as in the case of bonds.

The respondent cites the case of United States v. Bennett, 232 U. S. 299, as authority for the proposition that the rules of taxation applicable to the States have no application to the Federal Government. That case, however, held that the Federal Government had the constitutional right to tax its citizens on account of the use of foreign-built yachts, even though the property during the taxable period had its situs beyond the territorial limits of the United States, the basis of the decision being the relation of the United States to its citizens and their relation to it. The case at bar is wholly different. It involves the inclusion for estate-tax purposes of property of a nonresident alien. There is no analogy between the Bennett case and

the case before us. But in any event we are not concerned with the power of Congress to impose a tax, but only with the construction of the statute, that is, whether the statute which imposes an estate tax upon the property of a nonresident decedent intended to include therein certain property. We construe the statute as not imposing such a tax by the language used. Only property situated in the United States was included. And the Supreme Court has settled the question that intangible property is situated at the domicile of the owner, which in this case was not in the United States.

20 Conceding for the sake of argument that the Congress had the power to subject the transfer of the property here involved to the estate tax the question here is, Has it exercised that power by levying a tax measured by the value of intangible property situated in the United States belonging to a nonresident decedent? Under the Supreme Court decisions the property involved here was not "situated in the United States," but had its situs at the domicile of the owner.

In construing statutes levying taxes, it is the established rule not to extend their provisions by implications beyond the clear import of the language used, or enlarge their operations to embrace matters not specifically pointed out, and in case of doubt, they are construed most strongly against the Government. Gould v. Gould, 245 U. S. 151.

Certainly the statute applicable here does not in express language levy the tax upon nor measure the tax in the case of a nonresident decedent by the value of any property which is not "situated within the United States." Since the Supreme Court has now settled the law that the situs of stocks and bonds is at the domicile of the owner, then in the case of a nonresident decedent the statute does not lay a burden upon or measure it by the value of such property as is here involved.

The statute, in section 303 (d), expressly provides that stock in a domestic corporation owned and held by a nonresident decedent shall be deemed property within the United States. However, no such provision is made as to bonds of domestic corporations or stocks in foreign corporations. The express inclusion of the class of securities implies that others are not to be so treated. The rule expressio unius est exclusio alterius seems aptly to apply here. This indicates that Congress had in mind in the statute before us different recognized rules as to the situs for taxation purposes of intangible property, but, except in the case of stock in a domestic corporation, it has provided only that such property "situated in the United States" shall be included in the gross estate. The intangible property in question here follows the domicile of the owner, and is therefore not property "situated in the United States."

If Congress had desired or intended to include, for purposes of the estate tax, intangible property of nonresidents of the kinds here in controversy, a provision evidencing such intention could very easily have been incorporated in the statute, as was done with respect

to stock in domestic corporations. Certainly, to give such property a taxable situs in the United States, the statute must in any event expressly so provide. However, only in the specific case of stock in a domestic corporation has Congress undertaken by the statute to create any other situs for intangible property than that established by the rule of law as set out in the judicial decisions, that is, the domicile of the owner.

In the various State statutes involved in the cases before the Supreme Court, the States expressly sought to tax intangible property at places other than the domicile of the owner, it being conceded that the State of the domicile had the right to tax. But the statute before us does not expressly make provision for taxation except as to property "situated in the United States." That the property involved here was situated at the domicile of the decedent in
21 Cuba seems clear from the decisions. The foregoing discussion with respect to other intangibles is applicable to the money on deposit with Laurence Turnure & Co., regardless of whether it was engaged in the banking business. Whether it was so engaged or not, the money which it had credited to and placed on deposit for the decedent, like the other intangibles was not situated in the United States. Baldwin v. Missouri, supra.

Reviewed by the board.

Judgment will be entered under rule 50.

Before United States Board of Tax Appeals, Washington.

ERNEST BROOKS, HAROLD WILSON BROOKS, AND WALTER DOUGLAS BROOKS, as Executors of the Estate of Ernest Augustus Brooks, petitioners

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 32401

Decision

Pursuant to findings of fact and opinion promulgated February 5, 1931, the respondent herein to wit, on March 3, 1931, having filed a proposed redetermination in estate tax, and the petitioner on March 7, 1931, having filed notice of acquiescence to the said proposed redetermination, it is

Ordered and decided that there is a deficiency in estate tax in the amount of $1.79.

Enter March 11, 1931.

(Signed) LOGAN MORRIS,
Member.

A true copy.
Tetse:

[SEAL.] B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

In United States Circuit Court of Appeals for the Second Circuit

(Indorsed:) United States Board of Tax Appeals. Filed Sept. 5, 1931.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ERNEST BROOKS, HAROLD WILSON BROOKS, AND WALTER DOUGLAS BROOKS, Executors of the Will of Ernest Augustus Brooks, respondents

Docket No. 32401

Petition for review and assignments of error

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

Now comes David Burnet, Commissioner of Internal Revenue, by his attorneys, G. A. Youngquist, Assistant Attorney General, C. M. Charest, general counsel, Bureau of Internal Revenue, and Frank T. Horner, special attorney, Bureau of Internal Revenue, and respectfully shows:

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I

That he is the duly appointed, qualified, and acting Commissioner of Internal Revenue, appointed and holding office by virtue of the laws of the United States; that Ernest Brooks, Harold Wilson Brooks, and Walter Douglas Brooks are individuals, residents of the State of New York, with an office at 52 Broadway, New York, N. Y., and are the executors of the will of Ernest Augustus Brooks, deceased, and that the return for the estate of the said Ernest Augustus Brooks was filed with the collector of internal revenue for the third district of New York, whose office is located at 250 West 57th St., New York, N. Y., which is within the jurisdiction of the United States Circuit Court of Appeals for the Second Judicial Circuit.

That the court in which the review of this proceeding is sought is the United States Circuit Court of Appeals for the Second Judicial Circuit.

II

The nature of the controversy is as follows, to wit:

Ernest Augustus Brooks died October 31, 1924, a subject of Great Britain and a resident of the Republic of Cuba. Thereafter, Ernest Brooks, Harold Wilson Brooks, and Walter Douglas Brooks, residents of New York, were, by the Surrogate's Court of New York County, New York, granted letters testamentary upon the estate

of Ernest Augustus Brooks, deceased, qualified, and now are the acting executors of the will of the said Ernest Augustus Brooks.

The decedent, at the time of his death, on October 31, 1924, was the owner, among other things, of the following described property, valued as indicated, and in the possession of his son, Ernest Brooks, a resident of Cedarhurst, Long Island, N. Y., and Lawrence Turnure & Company in New York City:

Securities of the estate of Ernest Augustus Brooks held by Ernest Brooks on October 31, 1924

Property	Value
Canada Southern Ry. Co. 1st cons. mtg. guar. 5% bonds	$5,100.00
Accrued interest thereon	20.61
Swiss Conf. 20-yr. sinking fund 8% bonds	8,032.50
Accrued interest thereon	185.66
French Gov. 20-yr. external sinking fund 8% bonds	4,237.50
Accrued interest thereon	50.83
Kingdom of Norway external sinking fund 8% bonds	7,866.25
Accrued interest thereon	46.16
Kingdom of Denmark external sinking fund & refunding 8% bonds	7,743.75
Accrued interest thereon	24.62
Kingdom of Belgium 25-yr. external sinking fund 7½% bonds	5,487.50
Accrued interest thereon	155.73
Reading Co. gen. & ref. mtg. series A 4½% coupon bonds	1,253.49
Accrued interest thereon	19.99
Phil. & Read. Coal & Iron Co. ref. 5% bonds	675.20
Accrued interest thereon	11.05
Interborough Rapid Transit Co. 5% 1st ref. bonds	3,331.25
Accrued interest thereon	82.88
Southern R. R. Co. 1st cons. gen. mtg. 5% bonds	3,030.00
Accrued interest thereon	49.73
23 Great Northern Ry. Co. 1st & ref. mtg. series A, 4½% bonds	$2,737.50
Accrued interest thereon	42.28
B. & O. 1st mtg. 50-yr. 4% bonds	3,520.00
Accrued interest thereon	13.18
N. Y., Chi. & St. Louis 1st mtg. 4% bonds	3,700.00
Accrued interest thereon	13.18
South & North Ala. R. R. Co. gen. cons. 50-yr. 5% bonds	5,225.00
Accrued interest thereon	20.61
Indiana Steel Corp. 1st mtg. 5% bonds	2,055.00
Accrued interest thereon	49.73
Cleveland Short Line R. R. Co. 1st guar. mtg. 4½% bonds	2,868.75
Accrued interest thereon	11.13
Oregon Short Line R. R. Co. guar. ref. mtg. 4% bonds	4,868.75
Accrued interest thereon	83.06
Capital stock of the Central Romelie S. A. Cuba Joint Stock Co., of Guantanamo, Cuba	50,000.00
	122,612.87

Property of the Estate of Ernest Augustus Brooks held by Lawrence Turnure & Company on October 31, 1924

Property	Value
Canadian Nat'l. Ry. Co. 30-yr. 4½% coupon gold bonds	$19,150.00
Accrued interest thereon	114.36
Dominican Republic Customs Adm. sinking fund 5% coupon bonds	3,030.00
Accrued interest thereon	37.91
Kingdom of Belgium 26-yr. external sink. fund 7½% coupon bonds	4,390.00
Accrued interest thereon	124.59
Kingdom of Sweden 20-yr. 6% external coupon bonds	3,131.25
Accrued interest thereon	67.87
Kingdom of Norway 20-yr. 6% external coupon bonds	9,850.00
Accrued interest thereon	148.37

Property	Value
Michigan Central R. R. Co. (Air Line) 1st mtg. 4% coupon bonds	$45,000.00
Accrued interest thereon	663.04
Tennessee Coal & Iron and R. R. Co. gen. mtg. 5% coupon bonds	5,087.50
Accrued interest thereon	82.88
Ill. Central R. R. Co. 1st mtg. 4% coupon gold bonds	23,093.75
Accrued interest thereon	331.54
Union Pacific R. R. Co. 1st mtg. 4% coupon bonds	23,125.00
Accrued interest thereon	331.54
Chesapeake & Ohio Ry. Co. 1st cons. mtg. 4% coupon bonds	16,925.00
Accrued interest thereon	265.22
Chi., Rock Island & Pac. Ry. Co. gen. mtg. coupon 4% bonds	20,812.50
Accrued interest thereon	331.54
Erie R. R. Co. 1st cons. gen. prior lien 4% coupon bonds	7,050.00
Accrued interest thereon	132.61
Read. Co. gen. & ref. mtg. series A, 4½% coupon bonds	5,076.00
Accrued interest thereon	80.56
Phil. & Read. Coal & Iron Co. 5% coupon rfdg. mtg. bonds	2,733.75
Accrued interest thereon	41.43
Northern Pac. R. R. Co. prior lien 4% coupon bonds	31,018.75
Accrued interest thereon	114.13
Pac. R. R. of Mo. 1st external mtg. 4% coupon bonds	22,562.50
Accrued interest thereon	247.28
Central Pac. Ry. Co. 1st & ref. mtg. 4% coupon bonds	21,937.50
Accrued interest thereon	247.28
N. Y. Central & Hudson River R. R. Co. 3½% coupon bonds	3,850.00
Accrued interest thereon	43.27
Atl. Coast Line R. R. Co. 1st cons. mtg. 4% coupon bonds	22,875.00
Accrued interest thereon	165.75
N. Y., Chi. & St. Louis R. R. Co. 1st mtg. 4% coupon bonds	45,325.00
Accrued interest thereon	161.54
Atchison, Topeka & Santa Fe gen. mtg. 4% coupon bonds	22,562.50
Accrued interest thereon	82.42
St. Louis Iron Mountain & So. R. R. Co. gen. cons. mtg. 4% coupon bonds	25,031.25
Accrued interest thereon	103.03
24 B. & O. R. R. 1st mtg. 4% coupon bonds	4,400.00
Accrued interest thereon	16.48
Peoria & Eastern Ry. Co. 1st cons. mtg. 4% coupon bonds	2,373.75
Accrued interest thereon	9.89
American Smelting & Ref. Co. 1st mtg. series A 5% coupon bonds	9,625.00
Accrued interest thereon	41.20
Norfolk & Western R. R. 1st cons. mtg. 4% coupon bonds	22,406.25
Accrued interest thereon	82.42
Chi. & Northwestern R. R. Co. gen. mtg. 3½ coupon bonds	7,500.00
Accrued interest thereon	174.04
Evansville, Indianapolis & Terre Haute R. R. Co. coupon 1st mtg. 7% bonds	405.00
Accrued interest thereon	13.92
Lake Shore & Michigan Southern R. R. Co. 3½% coupon bonds	18,900.00
Accrued interest thereon	348.85
Oregon-Washington R. R. & Navigation Co. cons. mtg. 4% coupon bonds	4,400.00
Accrued interest thereon	83.05
Cleveland, Cincinnati, Chicago & St. Louis R. R. Co. ref. & imp. 6% coupon bonds	315.00
Accrued interest thereon	5.97
Missouri-Kansas-Texas R. R. Co. prior lien mtg. series B 4% coupon bonds	3,575.00
Accrued interest thereon	66.30
Missouri-Kansas-Texas R. R. Co. prior lien mtg. series A 5% coupon bonds	4,337.50
Accrued interest thereon	82.88
City of New York registered 4% corp. stock of 1956	14,775.00
Accrued interest thereon	298.57
Cash	14,517.98
	496,289.46

The said property of the total value of $618,902.33 was not included by the said executors in their return which they filed for Federal estate tax purposes.

The Commissioner of Internal Revenue, under date of October 13, 1927, sent a notice to the executors aforesaid, by registered mail, proposing a deficiency in estate tax on the transfer of the net estate of the said Ernest Augustus Brooks, deceased, in the amount of $24,865.88.

In determining the deficiency the commissioner included in the gross estate, under the provisions of subdivision (a) of section 301, subdivision (a) of section 302, and subdivisions (b), (d), and (e) of section 303 of the revenue act of 1924, the value of the property aforesaid owned by the decedent on the date of his death, October 31, 1924.

On October 28, 1929, the aforesaid executors filed a petition with the United States Board of Tax Appeals for a redetermination of the estate tax deficiency above mentioned.

After the answer of the commissioner was duly filed, a hearing was held before said board on December 5, 1929. The opinion and interlocutory decision of the board was promulgated February 5, 1931, and the final order of the board, redetermining the deficiency, was entered on March 11, 1931, in which it was ordered and decided that there is a deficiency in the estate tax in the amount of $1.79.

The board, misapplying Farmers Loan & Trust Company v. Minnesota, 280 U. S. 204, and Baldwin v. Missouri, 281 U. S. 586, held that the property in question had its situs at the domicile of its owner, Cuba; that the said property was not "situated in the
25 United States," and, therefore, that the value of such property was not subject to be included in the gross estate for purposes of the Federal estate tax, under the provisions of subdivision (a) of section 301, subdivision (a) of section 302 and subdivisions (b), (d), and (e) of section 303 of the revenue act of 1924.

III

The said commissioner, being aggrieved by the conclusions of law contained in said decision, and by the said order of redetermination, desires to obtain a review thereof by the United States Circuit Court of Appeals for the Second Circuit.

The commissioner's assignments of error are as follows:

(1) The Board of Tax Appeals erred in holding and deciding that the commissioner erred in including in the gross estate for Federal estate tax purposes the value of the securities and cash in question, under subdivision (a) of section 301, subdivision (a) of section 302, and subdivisions (b), (d), and (e) of section 303 of the revenue act of 1924.

(2) The Board of Tax Appeals erred in failing and refusing to hold and decide that the value of the said securities and cash should

be included in the gross estate of the decedent for Federal estate tax purposes, under subdivision (a) of section 301, subdivision (a) of section 302, and subdivisions (b), (d), and (e) of section 303 of the revenue act of 1924.

(3) The Board of Tax Appeals erred in holding that the securities and cash in question had a situs at the domicile of their owner, in the Republic of Cuba, and not in the United States, within the meaning of subdivision (a) of section 301, subdivision (a) of section 302, and subdivisions (b), (d), and (e) of section 303 of the revenue act of 1924.

(4) The Board of Tax Appeals erred in failing and refusing to hold and decide that the said securities and cash had a situs in the United States, for Federal estate tax purposes, within the meaning of sections 301, 302, and 303 of the revenue act of 1924.

(5) The Board of Tax Appeals erred in entering its final order of redetermination that there is a deficiency in the estate tax on the transfer of the net estate of Ernest Augustus Brooks only in the amount of $1.79, instead of a deficiency in estate tax due from the respondents herein in the sum of such amount as would be determined by including in the decedent's gross estate the value of the securities and cash in question.

(6) The Board of Tax Appeals erred in failing and refusing to enter a final order of redetermination that there is due from the estate of the said Ernest Augustus Brooks a deficiency in the estate tax in such amount as would result from the inclusion in the decedent's gross estate of the value of the securities and cash in question.

Wherefore, the commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Board of Tax Appeals for the Second Circuit, that a transcript of the record be prepared in accordance with law and with the rules of said court and transmitted to the clerk of said court for filing,
26 and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said court.

(Sig.) G. A. YOUNGQUIST.
Assistant Attorney General.

(Sig.) C. M. CHAREST.
General Counsel, Bureau of Internal Revenue.

Of counsel:

(Sig.) FRANK T. HORNER.
Special Attorney, Bureau of Internal Revenue.

Duly sworn to by C. M. Charest, jurat ommitted in printing.

In United States Circuit Court of Appeals for the Second Circuit

(Indorsed:) United States Board of Tax Appeals. Filed Sept. 14, 1931.

[Title omitted.]

Notice of filing petition for review

To ERNEST BROOKS,
Executor, Estate of Ernest Augustus Brooks,
393 7th Avenue, New York, N. Y.

To HAROLD WILSON BROOKS,
Executor, Estate of Ernest Augustus Brooks,
52 Broadway, New York, N. Y.

To WALTER DOUGLAS BROOKS,
Executor, Estate of Ernest Augustus Brooks,
52 Broadway, New York, N. Y.

To JAMES L. DOHR,
Attorney at Law, 52 Broadway, New York, N. Y.

You and each of you are hereby notified that the Commissioner of Internal Revenue did, on the 5th day of September, 1931, file
27 with the clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served up each of you.

Dated this 5th day of September, 1931.

(Signed) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 9th day of September, 1931.

(Sgd.) ERNEST BROOKS,
Respondent on Review.
(Sgd.) JAMES L. DOHR,
Attorney for Respondent on Review.

FTH/y 9/4/31.

In United States Circuit Court of Appeals for the Second Circuit

(Indorsed:) United States Board of Tax Appeals. Filed Mar. 3, 1932.

DAVID BURNETT, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ERNEST BROOKS, HAROLD WILSON BROOKS, AND WALTER DOUGLAS Brooks, as executors of the will of Ernest Augustus Brooks, respondents

DOCKET NO. 32401

Statement of evidence

Stipulation as to evidence, etc.

It is stipulated and agreed by and between the parties named in the above-entitled cause, appearing by their respective counsel of record, that the following statement, in narrative form, contains the substance of all the evidence heard and received by the United States Board of Tax Appeals at the hearing before it of this cause, in the city of Washington, District of Columbia, on the 5th day of December, 1929; that all of the evidence heard and received by the board was, except as hereinafter indicated, in the form of depositions theretofore duly taken, and of exhibits duly introduced and received in evidence, photostatic copies of which said exhibits appear herein and form a part hereof.

It is further stipulated and agreed that at the hearing of this cause before said board, there was introduced in evidence, by counsel for the respective parties hereto, both the direct and the cross-examination of the witness whose depositions had theretofore been taken as aforesaid, and that at said hearing before the board all objections saved and reserved by counsel for the respective parties at the time of the taking of said depositions were formally waived, save only those certain objections, hereinafter noted, which were formally renewed by counsel for the respective parties appearing at said hearing, with respect to which said renewed objections the board, at said hearing, ruled as herein indicted.

28 It is further stipulated and agreed that, on behalf of the respondents herein (petitioners below), there was duly taken the deposition of Ernest Brooks, a witness of lawful age, who, being first duly sworn according to law, deposed and testified as follows:

That his name is Ernest Brooks, and he resides at Lawrence, Long Island; that he is a member of the firm of Starrett & Van Vleck, has an office at 393 Seventh Avenue, New York City, and is engaged in the business of architecture.

That he is the Ernest Brooks who is the petitioner in the case pending before the United States Board of Tax Appeals, numbered 32401 on the appeal docket, and that Harold Wilson Brooks and Walter Douglas Brooks are also petitioners therein; that they are witness's brothers and his fellow executors of the estate of Ernest

Augustus Brooks, witness's father; that witness was familiar with the business of his father prior to his death, and that his father was engaged in the sugar and commission business in Santiago de Cuba; that witness's father did not have any business in the United States; that the letter exhibited to him by his attorney, Mr. Dohr, was a letter which witness had received from the office of the Commissioner of Internal Revenue.

Whereupon the said letter, exclusive of pencil notations thereon, was offered and received in evidence and marked "Petitioners' Exhibit No. 1. November 7, 1929, R. M. S.," and is as follows:

Petitioners' Exhibit 1, Nov. 7, 1929, R. M. S.

TREASURY DEPARTMENT.
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, December 24, 1926.

(Indorsed:) Received Dec. 28, 1926.
MT–ET–12402–NR–HHC.
District of 3rd New York.
Estate of Ernest Augustus Brooks.
Date of death, October 31, 1924.
Tentative deficiency, $24,865.88.
ERNEST BROOKS ET AL.,
Executors, estate of Ernest Augustus Brooks,
% Green and Hurd, Attorneys,
52 Broadway, New York, N. Y.

SIRS: The estate tax return filed for the above-named estate has been examined and a deficiency in respect of the tax has been tentatively determined.

If you acquiesce in the deficiency as determined, or in any part thereof, you may sign the enclosed waiver of the restrictions on the assessment of all or so much of the undischarged portion of the deficiency as results from adjustments in which you acquiesce and forward it to the Commissioner of Internal Revenue, Washington, D. C.

If you desire to protest against any portion of the deficiency such protest must be filed with the Commissioner of Internal Revenue within sixty days from the date of this letter. The procedure incident to the filing of a protest is governed by the regulations relating to estate tax, copies of which may be obtained upon application to the collector or to this office.

This determination is tentative only and no petition herefrom lies to the Board of Tax Appeal. If, upon further consideration,
29 at the expiration of the 60-day period for filing protest, it appears that a deficiency in respect of the tax exists final determination thereof will be made and you will be notified by registered mail in accordance with the provisions of section 308 (a) of the revenue act of 1926.

Examination of the return discloses the following:

Correct amount of tax	$25,201.08
Tax shown on the return	335.20
Deficiency	24,865.88

The following itemization shows the tentative findings of the bureau in accordance with the estate tax law.

A gross estate wherever situated, herein determined	$792,470.39
A gross estate in the United States, herein determined	654,137.96
Deductions allowed	9,119.98
A net estate in the United States, herein determined	645,017.98

The estate took a credit of $83.80 which is 25 per centum of the tax shown on the return, $335.20, on account of State inheritance tax paid to the State of New York. Inasmuch as the amount paid to the State of New York was $216.92, this is the amount allowable under the estate tax law. Accordingly, the undischarged portion of the tax is $24,732.76.

There will be assessed and collected as a part of the undischarged portion of the tax $24,732.76, interest at the rate of six per centum per annum from one year after decedent's death to the date of assessment or to the thirtieth day after the filing of the waiver of the restrictions on the assessment, whichever is the earlier.

Detailed itemization, gross estate

	Returned	Tentatively determined
Stocks and bonds		
94 shares Associated Dry Goods preferred	$8,671.50	$8,883.00
15 shares Baltimore and Ohio R. R. Co. common	922.50	924.38
4 shares Chicago and Eastern Illinois Railway Co. common	127.00	127.50
$50,000 face amount Michigan Central R. R. Co. first mtg. 4% bond		45,000.00
Accrued interest on above item		663.04
$5,000 Tennessee Coal, Iron and R. R. Co. general mtge. 5% bond		5,087.50
Accrued interest on above item		82.88
$25,000 Illinois Central R. R. Co. first mtge. 4% gold bond		23,093.75
Accrued interest on above item		331.54
$25,000 Union Pacific R. R. Co. first mtge. 4% bond		23,125.00
Accrued interest on the above item		331.54
$20,000 C. & O. R. R. Co. first consolidated general mortgage 4% bond		16,925.00
Accrued interest on the above item		265.22
$25,000 Chicago, Rock Island and Pacific R. R. Co. general mortgage 4% bonds		20,812.50
Accrued interest on the above item		331.54
$10,000 Erie R. R. Co. first consolidated, general prior lien 4% bonds		7,050.00
Accrued interest on above item		132.61
$5,400 Reading Co. general and refunding mortgage, series "A," 4½% bond		5,076.00
Accrued interest on the above item		80.50
$2,700 Philadelphia and Reading Coal and Iron Co. 5% bond		2,733.75
Accrued interest on the above item		41.43
$35,000 Northern Pacific R. R. Co. prior lien 4% bond		31,018.75
Accrued interest on the above item		114.13
$25,000 Pacific R. R. of Missouri first ext. mtge. 4% bond		22,562.50
Accrued interest on the above item		247.28
$25,000 Central Pacific R. R. Co. first and refunding mtge. 4% bond		21,937.50
Accrued interest on the above item		247.28
$3,000 Dominican Republic con. adm. sinking fund 5% bond		3,030.00
Accrued interest on the above item		37.91
$3,000 New York Central and Hudson River R. R. Co. 3½% bond		3,850.00
Accrued interest on the above item		43.27
$25,000 Atlantic Coast Line R. R. Co. first consolidated mtge. 4% bond		22,875.00
Accrued interest on the above item		165.75
$49,000 New York, Chicago and St. Louis first mortgage 4% bond		45,325.00
Accrued interest on the above item		161.54
$25,000 Atchison, Topeka, and Santa Fe general mortgage 4% bond		22,562.50
Accrued interest on the above item		82.42
$25,000 St. Louis, Iron Mt. and Southern Ry. general cons. mortgage 5% bond		25,031.25
Accrued interest on the above item		103.03
$5,000 B. & O. R. R. Co. first mortgage 4% bond		4,400.00
Accrued interest on the above item		16.48
$3,000 Peoria & Eastern Ry. Co. consolidated mortgage 4% bond		2,373.75
Accrued interest on the above item		9.89
$10,000 American Smelting and Refining Co. first mtge. series "A" 5% bond		9,625.00
Accrued interest on the above item		41.20

Detailed itemization, gross estate—Continued

	Returned	Tentatively determined
Stocks and bonds—Continued		
$25,000 Norfolk and Western R. R. Co. first cons. mtge. 4% bond		$22,406.25
Accrued interest on the above item		82.42
$15,000 city of New York 4% stock		14,775.00
Accrued interest on the above item		298.57
$10,000 Chicago and North Western Ry. Co. general mortgage 3½% bond		7,500.00
Accrued interest on the above item		174.04
$400 Evansville, Indianapolis & Terre Haute Ry. first mortgage 7% bond		405.00
Accrued interest on the above item		13.92
$24,000 Lake Shore and Michigan Southern Ry. 3½% bond		18,900.00
Accrued interest on the above item		348.85
$5,000 Oregon R. R. & Navigation Co. consolidated mortgage 4% bond		4,400.00
Accrued interest on the above item		83.05
$4,000 Kingdom of Belgium 20-year external sinking fund 7½% bond		4,390.00
Accrued interest on the above item		124.59
$3,000 Kingdom of Sweden 20-year 6% bond		3,131.25
Accrued interest on the above item		67.87
$300 Cleveland, Cincinnati, Chicago, and St. Louis Ry. Co. ref. & Improvement 6% bond		215.00
Accrued interest on the above item		5.97
$5,000 Missouri-Kansas-Texas R. R. Co. prior lien mtge. series "B" 4% bond		3,575.00
Accrued interest on the above item		66.30
$5,000 Missouri-Kansas-Texas R. R. Co. prior lien mtge. series "A" 5% bond		4,537.50
Accrued interest on the above item		82.88
$20,000 Canadian National Railways 30-year 4½% bond		19,150.00
Accrued interest on the above item		114.36
$10,000 Kingdom of Norway 20-year 6% ext. bond		9,850.00
Accrued interest on the above item		148.37
666 shares capital stock of Central Romelie S. A. Cuba Joint Stock Co. of Guantanamo, Cuba		50,000.00
$1,333.50 Reading Co. general & refunding mortgage series "A" 4½% bond		1,253.49
Accrued interest on the above item		19.99
$666.67 Philadelphia and Reading Coal & Iron Co. ref. 5% bond		675.20
Accrued interest on the above item		11.05
$5,000 Interborough Rapid Transit Co. 5% first refund bond		3,331.25
Accrued interest on the above item		82.88
$3,000 Southern Ry. Co. first cons. general mortgage 5% bond		3,030.00
Accrued interest on the above item		49.73
$7,000 Swiss Confederation twenty-year sinking fund 8% bond		8,032.50
Accrued interest on the above item		185.66
$3,000 Great Northern R. R. Co. first and ref. mtge. series "A" 4½% bond		2,737.50
Accrued interest on the above item		42.28
$5,000 French Government 20-year ext. sinking fund 8% bond		5,237.50
Accrued interest on the above item		50.83
$4,000 Baltimore and Ohio Railroad Co. first mtge., 50-year 4% gold bond		3,520.00
Accrued interest on the above item		13.18
$4,000 New York, Chicago and St. Louis, first mortgage 4% bond		3,700.00
Accrued interest on the above item		13.18
$5,000 South and North Alabama R. R. gen. cons. 50-year 5% bond		5,225.00
Accrued interest on the above item		20.61
$5,000 Canada Southern Railway Co. first cons. mtge. guar. 5% bond		5,100.00
Accrued interest on the above item		20.61
$3,000 Cleveland Short Line Railway Co. first guar. mortgage 4½% bond		2,868.75
Accrued interest on the above item		11.13
$7,000 Kingdom of Norway ext. sinking fund 8% bond		7,805.25
Accrued interest on the above item		46.16
$7,000 Kingdom of Denmark ext. sinking & refunding 8% bond		7,743.75
Accrued interest on the above item		24.62
$2,000 Indiana Steel Corporation first mortgage 5% bond		2,055.00
Accrued interest on the above item		49.73
$5,000 Oregon Short Line R. R. Co. guar. refund. mortgage 4% bond		4,868.75
Accrued interest on the above item		83.06
$5,000 Kingdom of Belgium 25-year ext. sinking fund 7½% bond		5,487.50
Accrued interest on the above item		155.73
Mortgages, notes, cash, and insurance		
Balance on deposit with the Lawrence Turnure & Co., 64 Wall Street, New York City		14,517.98
Deductions		
Attorneys' fees	$6,000.00	5,500.00

31 Deduction is made for attorneys' fees, in the amount found upon investigation, will be paid.

The sum of $11,048.61 is claimed in the return as a deduction from the gross estate for funeral expenses, attorneys' fees, miscellaneous

administration expenses, and debts of decedent. The proportionate share of this amount, $9,119.98, is herein tentatively deducted from that part of the gross estate situated in the United States, in accordance with the provisions of the revenue act of 1924.

All of the remaining items shown on the return, as a part of the gross estate in the United States, have been verified as filed.

Certificates releasing the estate tax lien on the American securities belonging to the decedent have been forwarded to the Collector of Internal Revenue, 250 West 57th Street, New York, New York, for delivery when the total tax due is paid.

This case has been audited in accordance with the retroactive provision of the revenue act of 1926 with respect to rates of tax.

Respectfully,

R. M. ESTES,
Deputy Commissioner.

EDM.
INC.

Treasury Department
Internal Revenue Service

Waiver of right to file petition with the United States Board of Tax Appeals and consent to assessment and collection of deficiency in estate tax.

NOTE.—When executed, this waiver will not extend the statute of limitations for refund or assessment of tax, nor will it be an agreement under the provisions of section 1106 of the revenue act of 1926.

To the COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

Attention: Miscellaneous Tax Unit, Estate Tax Division.

The undersigned, executor of the estate of Ernest Augustus Brooks, waives his right to file a petition with the United States Board of Tax Appeals for a redetermination of $——— (*deficiency) (*of the deficiency) disclosed by the letter from the Commissioner of Internal Revenue, Washington, D. C., dated Dec. 24, 1926, and bearing the symbols NR-12402-3rd NY, and consents to the immediate assessment and collection of the amount set forth above.

Signed_____ Date_____
Executor

Street_____ City_____ State_____

Further testifying, the witness stated that at the time of his death his father was the owner of certain stocks and bonds and that he, witness, was familiar with where those stock certificates and bonds were located, and that the list then shown to him was one which he had prepared and he recognized as a list of bonds such as he, witness, held in his possession for his father; that he had possession of the certificates and bonds at the time of his father's death and for some time prior to his death—several years prior to his death.

Whereupon there was offered and received in evidence the aforesaid list marked "Petitioner's Exhibit No. 2, November 7, 1929, R. M. S.," and is as follows:

* Strike out words not applicable.

Petitioner's Exhibit 2, Nov. 7, 1929, R. M. S.

Securities of the estate of E A. Brooks now held by Ernest Brooks, January 23, 1925

Friday, Oct. 31, 1924			Bonds	Due	Interest	Par value	Market value	Accrued interest
Bid	Sale	Asked						
.....	94	.....	Reading Co. gen. & ref. mortgage 4½% series "A"	1997	Jan. & July	$1,333.50	$1,253.49	$19.99
.....	101¼	.....	Philadelphia & Reading C. & I. Company ref. 5's	1973	Jan. & July	666.67	675.20	11.05
.....	66⅝	.....	Interborough Rapid Transit Co. 5% first refund	1966	Jan. & July	5,000.00	3,331.25	82.88
.....	101	.....	The Southern Railway Company first cons. general mtg. 5%	1994	Jan. & July	3,000.00	3,030.00	49.73
.....	114¾	.....	Swiss Confederation twenty-year sinking fund 8%	1940	Jan. & July	7,000.00	8,032.00	185.66
.....	91¼	.....	Great Northern R. R. Co. first & ref. mortgage 4¼% series "A"	1961	Jan. & July	3,000.00	2,737.50	42.28
.....	104⅜	.....	French Government twenty-year ext. sinking fund 8%	1945	Mar. & Sept	5,000.00	5,237.50	50.83
.....	88	.....	Baltimore & Ohio R. R. first mtg. 50-year gold 4%	1948	Apr. & Oct	4,000.00	3,520.00	13.18
.....	92½	.....	New York, Chicago & St. Louis first mtg. general 4%	1937	Apr. & Oct	4,000.00	3,700.00	13.18
104½	*	105¾	South & North Alabama gen. cons. 50-year 5%	1963	Apr. & Oct	5,000.00	5,225.00	20.61
.....	102	.....	Canada Southern R. R. Co. first cons. mtg. guar. A. 5%	1963	Apr. & Oct	5,000.00	5,100.00	20.61
95⅝	**	97	Cleveland Short Line Ry Co. first guar. mtg. 4½%	1961	Apr. & Oct	3,000.00	2,868.75	11.13
.....	112⅜	.....	Kingdom of Norway ext. sinking fund 8%	1940	Apr. & Oct	7,000.00	7,866.25	46.16
.....	102$^{23}/_{32}$	.....	United States Fourth Liberty loan 4¼%	1933–1938	Apr. & Oct	2,000.00	2,055.00	3.76
.....	110⅝	.....	Kingdom of Denmark ext. sinking & ref. 8%	1945	Apr. & Oct	7,000.00	7,743.75	24.62
.....	102¾	.....	Indiana Steel Corp. first mtg. 5%	1952	May & Nov	2,000.00	2,055.00	49.73
97⅜	***	97¾	Oregon Short Line R. R. guar. refund. mtg. 4%	1929	June & Dec	5,000.00	4,868.75	83.06
.....	102$^{29}/_{32}$	.....	United States First Liberty loan conv. 4¼%, reconverted to 4¼%	1932–1947	June & Dec	5,000.00	5,131.25	88.25
.....	109¾	.....	Kingdom of Belgium 25-year external sinking fund 7½%	1945	June & Dec	5,000.00	5,487.50	155.73
						79,000.17	79,918.49	972.44

*5 bonds sold at 104⅜ during week.
** 28 bonds sold at 95⅝ and 95¾ during week.
*** 45 bonds sold at 97¼ and 97½ during week.

33 Continuing, the witness testified that at the date of his death his father was the owner of 666 shares of the capital stock of the Central Romelie S. A. Cuba Joint Stock Company, of Guantanamo, Cuba, and that the certificates representing those shares were in the possession of witness and those certificates were in witness's possession in addition to the list shown on Exhibit No. 2; that witness, at the time of his father's death, had knowledge of the affairs of that company and knew that it was located in Guantanamo, Cuba, and that it was operating the business of sugar merchants there; that it was a Cuban corporation; that his father, at the time of his death, did not owe the witness any money and that these securities shown by petitioner's Exhibit No. 2, and the shares of stock of the Central Romelie were not pledged with witness for a loan; that witness deposited the income from these in his father's account in the bank, the Fifth Avenue Bank, New York; that he recognized a list then tendered him by his counsel as a list of the securities held for his father's account by Lawrence Turnure & Company at the time of his father's death, and that these securities were turned over to witness by Lawrence Turnure & Company.

Whereupon counsel for petitioners offered in evidence the said list which was received in evidence without objection and marked "Petitioners' Exhibit No. 3, November 7, 1929, R. M. S.," and is as follows:

Petitioners' Exhibit 3, Nov. 7, 1929, R. M. S.

Received from Lawrence Turnure & Company the following securities:

$50,000 Michigan Central R. R. Air Line 1st mtg. 4% bonds due 1940, coupon bonds Nos. 76/100, 251/75, with the July 1st, 1925, and all subsequent coupons attached.

$49,000 New York, Chicago & St. Louis R. R. 1st mtg. 4% bonds due 1937, coupon bonds Nos. 777/9, 2467/8, 5048/50, 5466/9, 9069/75, 9106/11, 9967/76, 11656/8, 13348/9, 13709/12, 13714, 17365, 18498/9, 19895, with the October 1st, 1925, and all subsequent coupons attached.

$25,000 Pacific R. R. of Missouri 1st mtg. extd. 4% bonds of 1938, coupon bonds Nos. 26, 147, 214, 216/18, 1312, 1315, 1537, 1539, 1579/81, 1888, 1926, 2838, 3219, 3250, 3268, 4428, 4656/7, 5092, 5234, 6513, with the August 1st, 1925, and all subsequent coupons attached.

$25,000 Illinois Central R. R. 1st mtg. 4% bonds due 1951, coupon bonds Nos. 11094/5, 11616/25, 11118, 11775, 11575/82, 12452/4, with the July 1st, 1925, and all subsequent coupons attached.

$25,000 Union Pacific R. R. 1st mtg. 4% bonds due 1947, coupon bonds Nos. 8139/40, 21752/3, 21824/5, 22996/8, 30750/1, 56137/8, 63206/17, with the July 1st, 1925, and all subsequent coupons attached.

$24,000 Lake Shore & Michigan Southern Ry. 3½% bonds due 1997, coupon bonds Nos. 4564/87, with the June 1st, 1925, and all subsequent coupons attached.

$35,000 Northern Pacific R. R. prior lien 4% bonds due 1997, coupon bonds Nos. 218/25, 5458, 5461, 22462, 42186, 19804/8, 13260, 42209, 42210/11, 60553, 61684, 69427/9, 13251/7, 31830/1, with the July 1st, 1925, and all subsequent coupons attached.

34 $20,000 Chesapeake & Ohio Ry., Richmond & Allegh. Div., 1st cons. mtg. 4% bonds of 1989, coupon bonds Nos. 12, 19, 545, 989/90, 1350, 1353, 2571/2, 2574/5, 3526/7, 3530/3, 4066, 4156, 5392, with the July 1st, 1925, and all subsequent coupons attached.

$25,000 Central Pacific R. R. 1st rfdg. mtg. 4% bonds due 1949, coupon bonds Nos. 66554/73, 47153/57, with the August 1st, 1925, and all subsequent coupons attached.

$1,000 Findlay, Ft. Wayne & Western R. R. 2nd mtg. 5% income bond of 1945; No. 462 of no value.

$25,000 Atchison, Topeka & Sante Fe R. R. genl. mtg. 4% bonds of 1995, coupon bonds Nos. 99, 2846, 3208, 55478/9, 76525, 76527 at $1,000 each, 1299/13007, 10222/6, 10231/40, 20254/5, 20411, 46617/18 at $500 each, with the October 1st, 1925, and all subsequent coupons attached.

$25,000 Chicago, Rock Island & Pacific Ry. genl. mtg. 4% bonds due 1988, coupon bonds Nos. 8226/35, 16225/9, 15405/07, 46831, 52145/50, with the July 1st, 1925, and all subsequent coupons attached.

$25,000 St. Louis, Iron Mountain & Southern Ry. genl. cons. mtg. 5% of 1931, coupon bonds Nos. 3469, 7047, 7176/7, 3783, 22733, 33936/7, 35602, 41392/400, 41603, 35112, 39335, 40124/5, 43021/2 with the October 1, 1925, and all subsequent coupons attached.

$10,000 Chicago & Northwestern R. R. genl. mtg. 3½% bonds due 1987, coupon bonds Nos. 5651/60, with the November 1st, 1925, and all subsequent coupons attached.

$5,000 New York Central & Hudson River R. R., Michigan Central coll. 3½% bonds of 1998, coupon bonds Nos. 13292/6 with the August 1st, 1925, and all subsequent coupons attached.

$5,000 Oregon R. R. & Navigation Co. cons. mtg. 4% bonds of 1946, coupon bonds Nos. 16804/8, with the June 1st, 1925, and all subsequent coupons attached.

$5,000 Baltimore & Ohio R. R. 1st mtg. 4% bonds of 1948, coupon bonds Nos. 5553, 6401/4, 7406, 8347, 8361/2, 8412 at $500, each with the October 1st, 1925, and all subsequent coupons attached.

$3,000 Peoria & Eastern Ry. 1st cons. mtg. 4% bonds due 1940, coupon bonds Nos. 1523/5, with the October 1st, 1925, and all subsequent coupons attached.

$25,000 Atlantic Coast Line R. R. 1st cons. mtg. 4% bonds of 1952, coupon bonds Nos. 7184/7208, with the September 1st, 1925, and all subsequent coupons attached.

$25,000 Norfolk & Western Ry. cons. mtg. 4% bonds of 1996, coupon bonds Nos. 13935/51, 13960/7 with the October 1st, 1925, and all subsequent coupons attached.

$10,000 Erie R. R. prior lien 4% bonds of 1996, coupon bonds Nos. 6085/93, 30214 with the July 1st, 1925, and all subsequent coupons attached.

$15,000 city of New York 4% corporate stock of 1956, registered in the name of Lawrence Turnure & Co., certificates Nos. 733/5, at $5,000 each.

$5,000 Tennessee Coal Iron R. R. Co. genl. mtg. 5% bonds of 1951, coupon bonds Nos. 4078/79, 4489/91 with the July 1st, 1925, and all subsequent coupons attached.

15 shares Baltimore & Ohio R. R. Co. common stock, certificate No. A25097, in the name of Lawrence Turnure & Co.

35 94 shares Associated Drygoods Corporation 1st pfd. stock, certificates Nos. 823 for 63 shs., 3975 for 14 shs., 3976 for 16 shs., and 4462 for 1 share, all in the name of Lawrence Turnure & Co.

$10,000 American Smelting & Rfg. Co. 1st mtg. 5% bonds of 1947, series A, coupon bonds Nos. 2766/75 with the October 1st, 1925, and all subsequent coupons attached.

$400 Evansville & Indianapolis R. R. Co. reorganization final distribution of certificate, name of Lawrence Turnure & Co., No. 79.

$400 Evansville & Indianapolis & Terre Haute Ry. Co. 1st mtg. 7% bonds due May 1st, 1950, coupon bonds Nos. C28/31 with the November 1st, 1925, and all subsequent coupons attached.

11 shares Wheeling & Lake Erie Ry. Co. preferred stock, certificate No. B O 3290, in the name of Lawrence Turnure & Co.

11 shares Wheeling & Lake Erie Ry Co. common stock, certificate No. C O 6772, in the name of Lawrence Turnure & Co.

$4,000 Kingdom of Belgium 7½% external loan bonds due 1945, coupon bonds Nos. 22396, 15629/31 with the June 1st, 1925, and all subsequent coupons attached.

$3,000 Kingdom of Sweden 6% external bonds due 1939, coupon bonds Nos. 10919, 9127, 12633 with the June 15th, 1925, and all subsequent coupons attached.

$3,000 Dominican Republic Customs Administration sinking fund 5% bonds due 1958, coupon bonds Nos. 6786, 1119/20 with the August 1st, 1925, and all subsequent coupons attached.

$300 Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. rfdg. & impvt. 6% bonds 1941, coupon bonds Nos. 130/32 with the July 1st, 1925, and all subsequent coupons attached.

4 shares Chicago & Eastern Illinois Ry Co. common stock, certificate No. O 2967, in the name of Lawrence Turnure & Co.

$5,000 Missouri, Kansas & Texas R. R. Co. prior lien mtg. 4% B bonds due 1962, coupon bonds Nos. 6177/81 with the July 1st, 1925, and all subsequent coupons attached.

$5,000 Missouri, Kansas & Texas R. R. Co. prior lien mtg. 5% A bonds due 1962, coupon bonds Nos. 22236/40 with the July 1st, 1925, and all subsequent coupons attached.

$5,400 Reading Co. general & rfdg. mtg. 4½% bonds due 1997, coupon bonds Nos. 56731/5 at $1,000 each, 10418/420 at $100 each, and No. 10531 at $100, with the July 1st, 1925, and all subsequent coupons attached.

$2,700 Philadelphia & Reading Coal & Iron Co. rfdg. mtg. 5% 1973, coupon bonds Nos. 22427/8 at $1,000 each, 1346 at $500, 12732 and 12832 at $100 each, with the July 1st, 1925, and all subsequent coupons attached.

$20,000 Canadian National Rys. 4½% 30-year bonds, due 1954, coupon bonds Nos. 23092/111 with the September 15th, 1925, and all subsequent coupons attached.

$10,000 Kingdom of Norway 6% bonds, external, due 1944, coupon bonds Nos. 17083/92 with the August 1st, 1925, and all subsequent coupons attached.

Continuing, witness stated that at the time of his death his father did not owe Lawrence Turnure & Company any money, and that the securities shown on petitioners' Exhibit No. 3 were not in any way pledged or hypothecated with Lawrence Turnure & Company;
36 that witness is familiar with the relationship existing between Lawrence Turnure & Company and his father, and that the income from those securities was deposited by Lawrence Turnure & Company to his father's account; that his father had a drawing account with Lawrence Turnure & Company and those coupons were deposited to his credit in that account, and to get the income his father drew a check on it against the account which checks were cashed by Lawrence Turnure & Company, who made a charge for the services they rendered his father; that witness knew that his father's will was executed in Santiago, Cuba.

Cross-examination:

On cross-examination the witness stated that his father was engaged in business as a partner in the firm of Brooks & Company, Santiago, and that Brooks & Company told in Cuba for American consumption—foreign consumption, the sugar which they manufactured; sold in Cuba or through their commission merchants in this country, and that his father did not at any time go to the United States for the purpose of placing orders for the partnership; that his father came to the United States simply for pleasure; that he came to the United States and he went to Europe very often in the summer time. And thereupon the following colloquy occurred:

"Q. He maintained a local residence, did he not?

"A. Where?

"Q. In New York City.

"A. I don't know how to answer that question. The house was mother's house. Did he maintain a residence if it was mother's residence?

"Q. It was your mother's residence?

"A. Yes."

Continuing, the witness testified that the reason he was in possession, at the time of his father's death, of certain securities belonging to his father, was that he, witness, held them for his father for several years prior to his death and that at the time his father transferred the securities to witness his father asked witness to take charge

of them and collect the interest and deposit it to his account; that the securities were in a safe deposit box in the Fifth Avenue Bank; that all of these securities owned by his father were either in the Fifth Avenue Bank or in the possession of Lawrence Turnure & Company; that the charge made by Lawrence Turnure & Company was a service charge for collecting coupons; it was a service charge of a broker; that Brooks & Company, the partnership, did not do business in the United States; that witness did not have frequent contact with Lawrence Turnure & Company; had no contact with them until the time of his father's death; did not know the nature of the business conducted by Lawrence Turnure & Company as of October 31, 1924, but it was understood they were bankers; that witness could not prove it and did not know whether they were subject to the jurisdiction of the State banking department as of that date.

Redirect examination:

On redirect examination the witness stated that he did not know that the service charge of Lawrence Turnure & Company was the charge of a broker; that he did not know that brokers in New
37 York City made a charge for collecting income; that Lawrence Turnure & Company made a charge for collecting coupons that a bank usually does for taking care of one's securities. Witness further testified that so far as he knew no charge is made for collecting income as to brokerage accounts; that of his own knowledge his father drew checks against the account with Lawrence Turnure & Company and that such checks were honored by that company; that he did not know whether any other persons had checking accounts at Lawrence Turnure & Company; that father of the witness did not own or rent a house in the United States.

Recross-examination:

Witness testified that he did not know whether, on October 31, 1924, and prior thereto, Lawrence Turnure & Company dealt in stock, bonds, and other securities; that in answering a question on direct examination that the charge of Lawrence Turnure & Company was the service charge of a broker, he did not know just what that meant as it was a technical question with which he was not familiar; that he was not really qualified to express any opinion as to the nature of the business conducted by Lawrence Turnure & Company as of October 31, 1924.

Redirect examination:

On further redirect examination the witness stated that prior to his death his father was engaged in business in Cuba as a member of the firm of Brooks & Company, but that at the time of death his father was not actively engaged in that business but had retired; that he did not think his father had any interest in said business at the date of his death; that the business of Brooks & Company owed his father money at the date of death; that he had first hand knowledge

of the transactions between his father and Lawrence Turnure & Company; that to his own knowledge his father had a checking account with Lawrence Turnure & Company; that his father drew checks against such checking account and that they were honored.

It is further stipulated and agreed that, on behalf of the respondents herein there was duly taken the deposition of Francis B. Hamlin, a witness of lawful age, who, being first duly sworn according to law deposed and testified as follows:

That his residence is at Garden City, New York; that by profession he is a lawyer and a member of the firm of Greene & Hurd, 52 Broadway, New York City; that he has practiced law since 1911; that during his practice of law he has had occasion to advise in administration of estates; that upwards of ten years past most of his time was devoted to handling the administration of estates; that the firm of Greene & Hurd was retained as attorney by the executors of the estate of decedent, and that witness had charge of this case throughout administration. The witness further testified that he received a copy of the last will of the decedent, which was in Spanish, and was subsequently informed by Spanish counsel that the will had been executed in Santiago, Cuba; that he recognized a paper then shown by him by his counsel as an English translation of the will of the decedent, certified by the clerk of the New York County Surrogates' Court, and that it was a translation of the original Spanish document.

Whereupon counsel for the petitioners offered in evidence
38 the said certified copy of the decedent's will, which was received in evidence without objection and marked "Petitioners' Exhibit No. 4, November 7, 1929, R. M. S.," and is as follows:

Petitioners' Exhibit 4, Nov. 7, 1929, R. M. S.

In the city of Santiago de Cuba, on December 19th, 1919, before me, Luis de Hechavarria y Limonta, attorney at law and notary public of the college of the district (Colegio del Territorio), with residence and legal domicile in this city, appears. Mr. Ernesto Augusto Brooks y Despaigne, of age, a property owner, a native of this city and district and with domicile on the Calle Alta de Mariano Corona No. 18, British subject, whom the witnesses declare they know, and whom they consider, as also do I, the notary, during this act to be sufficiently qualified legally to make a will; and by virtue of this he executes his will, without demanding secrecy, in the following manner:

1. He declares that he is the legitimate son of Mr. Tomás Brooks y Nicholson and Mrs. Rosa Despaigne y Ducongé, both defunct; having been married for the first and only time to Mrs. Elizabeth Ana Douglas y Arzola, from September 9th, 1869, until her death on November 8th, 1917, from which marriage they had four children named Digna Maria, Walter Douglas, Ernesto, and Harold Wilson Brooks y Douglas, all of age.

2. He appoints as his testamentary executors, who shall not be required to furnish any kind of bond as security for the discharge thereof, his legitimate sons, Messrs. Walter Douglas, Ernesto, and Harold Wilson Brooks y Douglas, to exercise their duties in the order in which they are mentioned, conferring upon his said executors the necessary legal faculties for the proper fulfillment thereof and extending the period granted by law for their operations to whatever date they may require, and authorizing them to delegate this charge in whole or in part to persons of their confidence whenever they so deem advisable, and authorizing them expressly to make contracts of sale and lease of those properties which constitute the estate; cancel mortgages, issue powers of attorney, and perform any other acts thru public or private documents which they deem of greatest advantage to the interests of the estate.

3. He also declares that the amount of his properties, their description and origin, as well as all outstanding assets and liabilities which may exist are known to his executors and heirs.

4. He declares also that he institutes and appoints as his only and universal heirs of all his estate, rights, and actions, had and to be had, his said legitimate children, Digna Maria, Walter Douglas, Ernesto and Harold Wilson Brooks y Douglas, that they enjoy and inherit it all in the name of the testator, for their free and absolute disposal.

5. That in the use of the authority which the law grants him, he prohibits absolutely any judicial intervention in his estate, even though minors may be interested, for he wishes that all the operations be handled extrajudicially, authorizing his executors exercising this will to appoint experts, accountants to make allotments of the estate and make any other appointments that may become necessary.

39 6. And he finally declares that he revokes and cancels any other will he may have made previous to the present one, as only this one shall be considered valid and subsistent so long as it is not canceled by another later one.

Thus he states and deposes before the witness to this instrument, who are of age, of this city, and without any disqualification to act as such, Messrs. Dr. Desiderio y Anráz y Vera, Pedro Pablo Valiente y del Monte, and Ricardo Federico Gómez y Fernández.

And, this will read by me, the notary, aloud and in one single act by request of all present, although I pointed out to them the right granted them by law to do so, each for himself, the testator Mr. Ernesto Augusto Brooks y Despaigne declared that since the document is in every respect in accordance with what he expressed, he ratifies it and in proof thereof signs it, together with the said witnesses.

To all of which, and to the fact that I know the testator, and that this act was completed without any interruption, and that there have been complied with all the formalities required in such cases by the Civil Code in effect, and to everything else contained in this public document which I sign and countersign with my flourish, and the execution whereof took place to-day at 2.30 p. m., I, the

notary, testify. E. A. Brooks.—R. F. Gómez.—D. Arnáz.—Pedro P. Valiente.—Luis de Hechavarría.

STATE OF NEW YORK,
County of New York, ss:

I, Martin G. McCue, clerk of the surrogate's court of said county, do hereby certify that I have compared the foregoing copy of the last will and testament (will embodied in decree) of Ernest Augustus Brooks, deceased, admitted to probate January 15th, 1925, and recorded in liber —— of wills, page —— with the original record thereof now remaining in this office, and have found the same to be a correct transcript therefrom and of the whole of such original record.

In testimony whereof, I have hereunto set my hand and affixed the seal of the surrogate's court of the county of New York, this 19th day of January, in the year of our Lord one thousand nine hundred and twenty-five.

MARTIN G. MCCUE,
Clerk of the Surrogate's Court.

P-2791-1924.
MW

Further testifying, the witness stated that as attorney for the estate he advised the executors to initiate probate proceedings in New York in order to secure release of certain assets of the estate; that the original will, under the Cuban law, was on deposit with a notary in Cuba and that no legal proceedings in Cuba were required under the Cuban law, particularly in view of the express provisions of the will itself; that in connection with the probate proceedings in New York transfer tax proceedings were had. Whereupon the following colloquy occurred:

"Q. Do you recall the basis upon which the estate was taxed by the State of New York?

40 "Mr. SLANKER. Objected to as immaterial and irrelevant.

"A. My recollection is that there were certain chattels here which under the New York transfer tax law were taxable in the estate of a nonresident."

This objection was renewed by counsel for petitioner herein at the time this case was heard before the Board of Tax Appeals in Washington, D. C., on December 5, 1929, which objection was sustained by the board.

Further testifying, the witness stated that there were no probate proceedings in Cuba in connection with this estate, because the witness advised the executors that such proceedings were unnecessary; the advice that probate proceedings in Cuba were unnecessary was based upon an opinion obtained from Cuban counsel; that the effect of the opinion obtained from Cuban counsel was that under the Cuban law no intervention of any court in Cuba was required for the administration and distribution of decedent's estate.

Cross-examination:

The witness further testified that the advice he received from Cuban counsel was by mail; that he does not know but does not think that any of the Cuban counsel are at present in New York City. In answer to a question as to whether New York State, for the purposes of State inheritance tax, taxed the same securities which the Federal Government was then attempting to tax, the witness stated that he thought not but that he believed the tax proceeding records were present, and, continuing, the witness stated that he refers to a copy of the report of the New York transfer tax appraiser and found that furniture, etc., in New York City, valued at $18,734.50; paintings in New York City valued at $2,415.00, and rugs in New York City valued at $1,183.00, were the only items subjected to tax in New York. At the hearing of this case before the Board of Tax Appeals in Washington, D. C., on December 5, 1929, counsel for petitioner herein moved to have this question and answer stricken out, and the board thereupon granted the motion and struck from the record the question propounded by the commissioner's counsel with reference to the action of the State of New York with respect to taxing the same securities, and the answer thereto.

The witness further testified that he did not think the New York statutes and the Federal statutes in connection with the taxation of stocks, bonds, and other securities are parallel. Whereupon counsel for the petitioners therein stated that he would "concede that they are not if," to which counsel for respondent therein replied "no." Upon hearing of this case before the Board of Tax Appeals in Washington, D. C., on December 5, 1929, counsel for petitioner herein moved that the question and answer with respect to whether the New York statutes and the Federal statutes with respect to the taxation of stocks, bonds, and other securities were parallel be stricken from the record, which motion was thereupon granted by the board.

Further testifying, the witness stated that his statement on direct examination, that he had been informed by Cuban counsel that the will of decedent was executed in Santiago, Cuba, was based on information received from said Cuban counsel; that he was careful not to state that of his own knowledge he knew it was so executed.

41 Redirect examination:

The witness stated that he was familiar with the fact that the will itself showed it was executed in Santiago, Cuba, and that the will speaks for itself; that he recalled making arrangements for taking depositions in Cuba of witnesses of the will; and that the New York transfer tax was determined on the basis that the decedent was a nonresident of New York.

Upon the hearing of this case before the Board of Tax Appeals in Washington, D. C., on December 5, 1929, the petitioners offered in evidence the original of a letter dated October 13, 1927, addressed to the executors of the will of the decedent, by the Commissioner of Internal Revenue, which evidence was not objected to by counsel for

respondent therein, and the said letter was thereupon received in evidence by the Board of Tax Appeals and marked "Petitioners' Hearing Exibit No. 1," and is as follows:

Petitioners' Exhibit No. 1

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, Oct. 11, 1927.

MT-ET-C1.-NR-12402-FOB.
District of 3rd New York.
Estate of Ernest Agustus Brooks.
Date of death, October 31, 1924.

(Indorsed:) U. S. Board of Tax Appeals. Div. Docket 32401, admitted in evidence Dec. 5, 1929.

ERNEST BROOKS, ET AL.,
Executors, Estate of Ernest Augustus Brooks, c/o Green and Hurd, Attorneys, 52 Broadway, New York, New York.

SIRS: The bureau has examined the protest filed on behalf of the above-named estate against the tentative findings set forth in the letter addressed to the executor by this office under date of Dec. 24, 1926. The deficiency hereby determined amounts to $24,865.88, and is fully explained in the attached statement, consisting of two pages, showing the action of the bureau with respect to the protest.

In accordance with the provisions of Title III of the revenue act of 1926, you are allowed 60 days from the date of the mailing of this letter (not counting Sunday as the sixtieth day) within which to file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the said board within the 60-day period prescribed.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed, and an assessment has been made, or where a taxpayer has filed a petition, and an assessment in accordance with the decision, which has become final, has been made, the unpaid amount of such assessment must be paid upon notice and demand from the collector of internal revenue. No claim for abatement can be entertained.

42 If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute the enclosed Form 890, waiving (1) your right to file a petition with the United States Board of Tax Appeals and (2) the restrictions on the assessment and collection of such deficiency, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of the Estate Tax Division,

Miscellaneous Tax Unit. In the event that you acquiesce in only a part of the determination, the enclosed form of waiver should be executed with respect to the amount of the deficiency to which you agree.

Respectfully,

D. H. BLAIR, *Commissioner.*

QR
Enclosures:
Statement.
Waiver—Form 890.

The items involved in your protest are indicated below:

Gross estate	Returned	Tentatively determined	Determined
Schedule B			
Bonds of foreign corporations and accrued interest thereon	$0.00	$24,384.97	$24,384.97
Bonds of foreign governments and accrued interest thereon	.00	55,610.49	55,610.49
Bonds of domestic corporations and accrued interest thereon	.00	460,315.32	460,315.32
Bonds of domestic municipalities and interest thereon	.00	15,073.57	15,073.57
Stock in foreign corporations	.00	50,000.00	50,000.00
Schedule C			
Balance on deposit with Lawrence Turnure & Company	.00	14,517.98	14,517.98

As no adjustment is shown, the following findings are made:

	Returned	Determined
Gross estate, wherever situated	$784,887.25	$792,470.39
Gross estate in the United States	34,021.75	654,137.96
Deductions	501.51	9,119.98
Net estate within the United States	33,520.24	645,017.98
Tax returned	335.20	25,201.08
Deficiency		24,865.88

On account of payment of State inheritance taxes there is allowable against the Federal estate tax a credit of not to exceed twenty-five per centum thereof. Accordingly, the portion of the deficiency proposed for assessment is $24,732.76, together with interest thereon at the rate of six per centum per annum from one year after the decedent's death to the date of assessment, or to the thirtieth day after the filing of waiver, Form 890, whichever is the earlier.

The foregoing evidence is all of the material evidence adduced at the hearing before the Board of Tax Appeals, and the same is approved by the undersigned, C. M. Charest, General Counsel, Bureau of Internal Revenue, as attorney for the Commissioner of Internal Revenue.

(Signed) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

43 The foregoing is all of the material evidence adduced at the hearing before the Board of Tax Appeals, and the same is

approved by the undersigned, as attorney for the respondents on review.

(Signed) JAMES L. DOHR,
Attorney for Respondents on Review.

Order settling statement of evidence

This statement of evidence is duly approved and settled this 3rd day of March, 1932.

(Signed) LOGAN MORRIS,
Member United States Board of Tax Appeals.

FTH/y 2/27/32

In United States Circuit Court of Appeals for the Second Circuit

(Indorsed:) United States Board of Tax Appeals. Filed Mar. 3, 1932.

[Title omitted.]

Præcipe for record

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit, and deliver to the clerk of the United States Circuit Court of Appeals for the Second Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Second Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the board.
2. Pleadings before the board:
(a) Petition, including annexed copy of deficiency letter.
(b) Answer.
3. Findings of fact, opinion, and decision of the board.
4. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.
5. Statement of the evidence as settled and allowed.
6. Orders enlarging time for the preparation of the evidence and for the transmission and delivery of the record.
7. This præcipe.

(Signed) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Service of a copy of the within præcipe is hereby admitted this 1st day of March, 1932.

(Signed) JAMES L. DOHR,
Attorney for Respondents.

FTH/y 2/27/32.

44 [Clerk's certificate to foregoing transcript omitted in printing.]

45 In United States Circuit Court of Appeals for the Second Circuit

No. 462. October term, 1931

(Argued June 13, 1932. Decided July 29, 1932)

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ERNEST BROOKS, HAROLD WILSON BROOKS, AND WALTER DOUGLAS BROOKS, as Executors of the Will of Ernest Augustus Brooks, respondents

Appeal from the United States Board of Tax Appeals

Before L. HAND, AUGUSTUS N. HAND, and CHASE, Circuit Judges

Petition to review a decision of the United States Board of Tax Appeals. Affirmed.

G. A. Youngquist, Asst. Atty. Gen., Sewall Key, and J. Louis Monarch, Sp. Assts. to Atty. Gen. (C. M. Charest, Gen. Counsel, Bureau of Internal Revenue, Frank T. Horner, Sp. Atty., Bureau of Internal Revenue, of Washington, D. C., of counsel), for petitioner.

Greene & Hurd, of New York City (Francis B. Hamlin and James L. Dohr, both of New York City, of counsel), for respondents.

Milbank, Tweed, Hope & Webb, Edward N. Perkins, and Selden Bacon, all of New York City, amicus curiæ.

Opinion

CHASE, Circuit Judge.

The decedent, Ernest Augustus Brooks, died October 31, 1924. He was domiciled in Cuba and a British subject. At the time of his death, he was not engaged in business in the United States. He then owned bonds of foreign corporations, bonds of foreign governments, bonds of domestic corporations, bonds of a domestic municipality, and stock in a foreign corporation which were either in the possession of his son, Ernest Brooks, or of the brokerage firm of Lawrence, Turnure & Co., and were all in New York City. These securities were not used in any business or pledged or held in any way as security for any debt. They were left in the care of his son or the brokerage company. The son collected the income on the securities he held and deposited it in his father's account with the Fifth Avenue Bank of New York City. The brokerage firm collected income and deposited it in an account with that firm, against which the decedent drew checks that were always honored. At his death, the decedent had on deposit with Lawrence, Turnure & Co. $14,517.98 in this checking account.

The deficiency assessment was due to the fact that the commissioner included the above-mentioned property in the gross estate of the decedent situated in the United States. The Board of Tax Appeals held that its inclusion was erroneous, and the petition for review brings this question before us.

It is claimed that the provisions of the revenue act of 1924, c. 234, 43 Stat. 253, required the action taken by the commissioner. So far as pertinent, the statute (sections 302 (a), 303 (b–e) of the act, 26 USCA §§ 1094 note, 1095 note) is quoted:

"Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

"(a) To the extent of the interest therein of the decedent at
46 the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate. * * *

"Sec. 303. For the purpose of the tax the value of the net estate shall be determined— * * *

"(b) In the case of a nonresident, by deducting from the value of that part of his gross estate which at the time of his death is situated in the United States— * * *

"(d) For the purpose of Part I of this title, stock in a domestic corporation owned and held by a nonresident decedent shall be deemed property within the United States. * * *

"(e) The amount receivable as insurance upon the life of a nonresident decedent, and any moneys deposited with any person carrying on the banking business, by or for a nonresident decedent who was not engaged in business in the United States at the time of his death, shall not, for the purpose of Part I of this title, be deemed property within the United States. * * *"

The respondents meet the contentions of the commissioner in two ways. First they say that the intangibles mentioned should not be held to be "property situated in the United States" at the time the decedent died. And, second, if Congress intended to subject these intangibles to the estate tax, it was powerless to do so because of the fifth amendment.

To decide the first question, it is necessary to determine whether such securities as these came within the "phrase property situated within the United States" as of the time the statute was passed and took effect. We shall confine our consideration to intangible personal property. It had long been the law of the United States in respect to state taxation that such property had its taxable situs at the domicile of the owner regardless of the place where the paper evidences of the obligations were kept. State Tax on Foreign Held Bonds, 15 Wall. 300, 21 L. Ed. 179; Kirtland v. Hotchkiss, 100 U. S. 491, 25 L. Ed. 558; New Orleans v. Stempel, 175 U. S. 309, 20 S. Ct. 110, 44 L. Ed. 174. This limitation on the state taxation of intan-

gibles was, however, modified in Blackstone v. Miller, 188 U. S. 189, 23 S. Ct. 277, 47 L. Ed. 439, to permit New York to tax the transfer by will of debts due the decedent, who died domiciled in Illinois, from residents of New York. This decision recognized as lawful the power of the state of the domicile of the debtors to tax the transfer of the debts. It did not expressly hold that intangible property had a taxable situs also at the place where the securities themselves were located, but the close applicability of the reasoning of the opinion to give such a taxable situs cannot be gainsaid. Blackstone v. Miller was expressly overruled in Farmers' Loan & Trust Co. v. Minnesota, 280 U. S. 204, 50 S. Ct. 98, 74 L. Ed. 371, 65 A. L. R. 1000, but that was not until some years after the statute here involved was passed, and cannot help in determining what Congress meant in 1924 by "property situated in the United States." In De Ganay v. Lederer, 250 U. S. 376, 39 S. Ct. 524, 63 L. Ed. 1042, it was held that securities owned by a nonresident but physically present in Philadelphia in the possession of an agent who collected and remitted the income to the owner abroad were property. These securities were stocks, bonds, and mortgages secured upon property in the United States, or payable by persons or corporations domiciled in the United States, and it was further held, on the authority of Blackstone v. Miller, supra, among other decisions cited, that such property was within the United States and so within the meaning of Congress in taxing the income derived from property owned in the United States by persons residing elsewhere. While this case dealt with income, that alone does not serve to distinguish what was held as to the location of the income producing property. At least as to the bonds of domestic corporations, the state of the declared law in 1924 would afford good basis for the belief that Congress meant to include the intangibles here involved in the gross estate situated in the United States of a nonresident decedent. Moreover, in Tappan v. National Bank, 19 Wall. 490, 22 L. Ed. 189, it has been held that shares of stock in a national bank could be made taxable at the place where they actually were regardless of the domicile of their owner. But these cases dealt with the power to tax; the intent to tax being plain. Here we are for the present not concerned with the power but with the intent to subject this property to the estate tax. Did the statute throw no further light on the intent of Congress, perhaps the foregoing would have been enough to put this property within the language used,
especially since Treasury regulations under previous revenue
47 laws had provided for the inclusion in the gross estate of a
nonresident decedent of bonds physically present in the United States. See T. R. 37, art. 60, and T. R. 63, art. 53; National Lead Co. v. United States, 252 U. S. 140, 40 S. Ct. 237, 64 L. Ed. 496. As to these regulations, however, see Shenton v. United States (D. C.) 53 F. (2d) 249.

But in section 303 (d) of this statute Congress expressly provided that "stock in a domestic corporation owned and held by a

nonresident decedent shall be deemed property within the United States. * * *" As the Board of Tax Appeals pointed out and the respondents insist, the express inclusion of such intangibles implies the exclusion of others under the maxim, expressio unius est exclusio alterius. Had Congress intended to include stock in a domestic corporation, and certainly there is much more reason to treat such intangibles as localized in this country than to treat stock in a foreign corporation or foreign bonds as property situated in the United States, there would have been no purpose in making the express provision to that effect. All question of power to tax aside, the most it would have done, so it would seem, would have been, if such stock was understood to be within the general coverage of the law, to have especially provided that it should be deemed property within the United States even though the certificates were kept elsewhere. The special treatment of the proceeds of life insurance in section 303 (e) as property not within the United States would by the same token tend toward a contrary view of what Congress intended to be included generally were is not for the fact that section 403 (b) (3) of the revenue act of 1918 (40 Stat. 1098) provided that: "The amount receivable as insurance upon the life of a nonresident decedent where the insurer is a domestic corporation, shall be deemed property within the United States." In section 403 (b) (3) of the revenue act of 1921 (42 Stat. 279) the above-quoted provision of the 1918 act was repealed, and the express repealing provision of the 1921 act was simply carried into the revenue act of 1924. So, too, might the special treatment of money on deposit with banks or bankers in section 303 (e) be thought to indicate the intent to treat all other debts as property situated in the United States when the debtors were domiciled there. When, however, effect is given to the commercial aspects of the relation between a foreign depositor and his banker in this country with its influence on the world trade of this nation, and it is recognized that this provision was but the reaffirmation of the general rule that debts have no taxable situs at the domicile of the debtor, we think it is more reasonable to believe that Congress was merely careful to assure such business that it would not be hampered.

In any event, the uncertainty which exists respecting the intended scope of the law as to intangible property of nonresident decedents which has no business situs in this country makes it doubtful that Congress meant to subject it to the estate tax. That being so, the doubt, under well-known principles, should be resolved in favor of the taxpayer. Gould v. Gould, 245 U. S. 151, 153, 38 S. Ct. 53, 62 L. Ed. 211.

As we are constrained to hold that the statute does not reach this property for purposes of taxation, it is unnecessary to express any opinion as to the power of Congress to tax it.

The decision of the Board of Tax Appeals is affirmed.

L. HAND, Circuit Judge, concurs with supplemental memo.

48 United States Circuit Court of Appeals for the Second Circuit

No. 462. October term, 1931

Argued June 13, 1932. Decided July 29, 1932

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ERNEST BROOKS, HAROLD WILSON BROOKS, AND WALTER DOUGLAS Brooks, as Executors of the Will of Ernest Augustus Brooks, respondents

Appeal from the United States Board of Tax Appeals

Before L. HAND, AUGUSTUS N. HAND, and CHASE, Circuit Judges

Concurring opinion

L. HAND, Circuit Judge (concurring).

I hardly think that the internal evidence of the statute would have alone been enough to turn the scale with me in the taxpayer's favor. I rely chiefly upon the fact that if the Treasury be right, the act is open to very grave constitutional doubts. It is now settled that a State may not tax the transfer of bonds at the domicile of the obligor, when the obligee lives in another State. Farmers' L. & T. Co. v. Minnesota, 280 U. S. 204, 50 S. Ct. 98, 74 L. Ed. 371, 65 A. L. R. 1000; Baldwin v. Missouri, 281 U. S. 586, 50 S. Ct. 436, 74 L. Ed. 1056, 72 A. L. R. 1303; Beidler v. South Carolina Tax Commission, 282 U. S. 1, 51 S. Ct. 54, 75 L. Ed. 131. We should have to say that a different doctrine applies when Congress taxes the transfer of bonds of an American corporation held by an Englishman. Certainly the cases are so far parallel as to put the validity of such an act in great question.

49 In United States Circuit Court of Appeals, Second Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

ERNEST BROOKS, ET AL., AS EXECUTORS, ETC., RESPONDENT

Judgment filed August 5, 1932

Appeal from the United States Board of Tax Appeals.

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be and it hereby is affirmed.

It is further ordered that a mandate issue to the said board in accordance with this decree.

WM. PARKIN, *Clerk.*

50 [File endorsement omitted.]

51 [Clerk's certificate to foregoing transcript omitted in printing.]

52 Supreme Court of the United States

Order allowing certiorari

Filed December 5, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(Indorsement on cover:) File No. 37,193. U. S. Circuit Court of Appeals, Second Circuit. Term No. 496. David Burnet, Commissioner of Internal Revenue, petitioner, v. Ernest Brooks, Harold Wilson Brooks, and Walter Douglas Brooks, as executors of the will of Ernest Augustus Brooks. Petition for a writ of certiorari and exhibit thereto. Filed November 4, 1932. File No. 37,193.

U. S. GOVERNMENT PRINTING OFFICE: 1932

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No. 496

In the Supreme Court of the United States

OCTOBER TERM, 1932

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ERNEST BROOKS, HAROLD WILSON BROOKS, AND WALTER DOUGLAS BROOKS, AS EXECUTORS OF THE WILL OF ERNEST AUGUSTUS BROOKS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. ——

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

ERNEST BROOKS, HAROLD WILSON BROOKS, AND WALTER DOUGLAS BROOKS, as executors of the will of Ernest Augustus Brooks

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in the above case on August 5, 1932. (R. 49.)

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 11–21) is reported in 22 B. T. A. 71. The opinion of the Circuit Court of Appeals (R. 45) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered August 5, 1932. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, under Sections 301, 302, and 303 of the Revenue Act of 1924, the gross estate of a nonresident decedent should include the value of intangible property the physical evidences of which are actually present in the United States.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved appear in the Appendix, *infra*, pp. 10–12.

STATEMENT

The facts found by the Board (R. 8–11) may be summarized as follows: Respondents' decedent was a subject of Great Britain, and at the time of his death on October 31, 1924, was a resident of Cuba. At that time he owned securities which were located in New York City. (R. 8.) He was not then engaged in business in the United States (R. 8) and the securities were not pledged, hypothecated, or held as security for any indebtedness (R. 11). Some of the securities were in the possession of the decedent's son in New York City. (R. 11.) They had been held by him for several

years, his father having asked him to take charge of the securities, collect the interest, and deposit it to the decedent's account in a New York bank. (R. 36.) The remainder of the securities were in the possession of Lawrence Turnure & Company, in New York City, which collected the income and placed it to the decedent's credit in a drawing account, against which the decedent from time to time drew checks. The company made a charge for the services rendered in this connection. (R. 11.)

The securities consisted of the following (R. 8–11):

Bonds of foreign corporations and accrued interest thereon	$24,384.97
Bonds of foreign governments and accrued interest thereon	55,610.49
Bonds of domestic corporations and accrued interest thereon	460,315.32
Bonds of a domestic municipality and accrued interest thereon	15,073.57
Stock in a foreign corporation	50,000.00

At the time of his death the decedent also had cash on deposit with Lawrence Turnure & Company, New York City, in the amount of $14,517.98. (R. 8.)

The Commissioner included the above property in determining the value of that part of the gross estate of the decedent which at the time of his death was situated in the United States. (R. 11.) The Board held that this property was erroneously included in the gross estate (R. 21) and its decision was affirmed by the court below (R. 45–47).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

1. In failing to hold that the stocks, bonds, and cash on deposit were property situated in the United States within the meaning of Section 303(b) of the Revenue Act of 1924.

2. In holding that the Revenue Act of 1924 did not require the inclusion in the gross estate of a nonresident decedent of the value of intangible property the physical evidences of which are actually present in the United States.

3. In affirming the decision of the Board of Tax Appeals.

REASONS FOR GRANTING THE WRIT

1. The matters decided by the court below are of unusual importance in the administration of the revenue laws. From an examination of the last 1,745 nonresident cases finally closed, the Treasury Department has estimated that more than $1,000,000 in estate taxes will be subject to refund if the present decision is allowed to stand, and future collections from nonresident estates will be reduced by approximately 17%. The decision of the court below, if allowed to stand, will result in much litigation with respect to those estates which are not finally closed.

2. The construction of the statute adopted by the court below defeats the apparent purpose of Congress to reach the transfer of every kind of property within its power. When the statute was en-

acted it was settled that there was power to deal with intangibles on the footing of a situs separate from that of their owner (*Eidman* v. *Martinez,* 184 U. S. 578, 582; *Wheeler* v. *Sohmer,* 233 U. S. 434, 439), and under a statute fairly comparable to the one here involved this Court had decided that intangibles physically held in the United States by an agent under a power of attorney from a nonresident alien was property within the United States (*DeGanay* v. *Lederer,* 250 U. S. 376, 382).

3. The decision of the Circuit Court of Appeals that Congress did not intend to include in the gross estate of a nonresident decedent the intangibles owned by him and situated in the United States, is opposed to the consistent administrative construction of the Revenue Acts, at least so far as bonds are concerned. Bonds comprise the main portion of the estate in this case. Article 60 of Treasury Regulations 37, applicable to the Revenue Act of 1918, provided that "Bonds actually situated in the United States, moneys on deposit with domestic banks and moneys due on open accounts by domestic debtors constitute property subject to tax." Article 53 of Treasury Regulations 63 (1922 Edition), applicable to the Revenue Act of 1921, provided that "Bonds actually within the United States, moneys due on open accounts by domestic debtors and stock of a corporation or association created or organized in the United States, constitute property having its situs in the United States." Article 50, Treasury Regulations 68, applicable to the Revenue

Act of 1924, which is here involved, provides as follows:

> Real estate within the United States, stocks and bonds physically in the United States at date of death, moneys due on open accounts by domestic debtors, and stock of a corporation or association created or organized in the United States, constitute property having a situs in the United States. * * *

Article 50, Treasury Regulations 70 (1926 Edition), applicable to the Revenue Act of 1926, and Article 50 of Treasury Regulations 70 (1929 Edition), applicable to the Revenue Acts of 1926 and 1928, have added bills, notes, and mortgages to the list of intangibles having a situs in the United States.

These regulations have been impliedly sanctioned by the repeated reenactment of the statute upon which they rest. Section 403 (b), Revenue Acts of 1918 (c. 18, 40 Stat. 1057, 1098) and 1921 (c. 136, 42 Stat. 227, 279); Section 303 (b), Revenue Acts of 1924 (*infra*, p. 9) and 1926 (c. 27, 44 Stat. 9, 72; U. S. C. App., Title 26, Sec. 1095). Upon well-settled principles these regulations have the force of law and are not to be disregarded without cogent reasons. *National Lead Co.* v. *United States*, 252 U. S. 140, 146; *Brewster* v. *Gage*, 280 U. S. 327, 337.

Until 1924 the Treasury regulations did not specifically include stock of a foreign corporation among the classes of intangible property having situs in the United States. Treasury Regulations

68, Article 50, applicable to the Revenue Act of 1924, provide, however, that "stocks and bonds physically in the United States at date of death * * * constitute property having a situs in the United States." The Revenue Act of 1926, Section 303 (b), *supra,* reenacted the statute to which the above regulations related, and thus, by inference, indicated congressional approval of the administrative interpretation. The earlier regulations (see Regulations 37, Article 60, and Regulations 63 (1922 ed.), Article 53) did not expressly limit the estate tax to the classes of intangible property mentioned and the failure of these regulations to mention stock of foreign corporations can not limit the purpose of Congress to tax all property within the reach of the statute.

Section 303 (e) of the 1924 Act, *infra,* expressly excepted from the scope of the statute the amount receivable as insurance upon the life of a nonresident decedent and bank deposits of a nonresident decedent not engaged in business in the United States. The implication is that other intangibles similarly situated and not so excepted shall be deemed to be property within the United States.

Section 303 (d), *infra,* provides that "stock in a domestic corporation owned and held by a nonresident decedent shall be deemed property within the United States." The court below erroneously concluded that the application of the maxim *expressio unius est exclusio alterius* excluded other intangibles. The maxim does not apply, for it is clear that

Congress, rather than limiting the operation of the statute, extended it to insure the inclusion of domestic stock wherever it was held, whether or not physically present in the United States. This appears to have been the construction put upon Section 202 (c) of the Revenue Act of 1916, c. 463, 39 Stat. 756, 778, of which Section 303 (d) of the 1924 Act is a counterpart. See Treasury Decision 2530. The 1924 Act was similarly interpreted. Article 50, Regulations 68; cf. Article 18, Regulations 67. Unless Section 303 (d) applies to domestic stock *wherever located* Congress would have had no reason to make it inapplicable to a tax upon gifts of property *situated within the United States.* Section 303 (d) was made inapplicable to the gift tax by limiting it to "Part I of this title."

(4) One of the judges of the court below concurred in the result reached by the majority because he believed the construction of the statute for which we contend would raise a grave constitutional question. Recent decisions of this Court rendered since the enactment of the applicable statute,[1] holding that the situs of intangibles is at the domicile of the owner for the purpose of State taxation, have raised doubt as to the power of Congress to include in the gross estate intangibles of

[1] *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204; *Baldwin* v. *Missouri*, 281 U. S. 586; *Beidler* v. *South Carolina Tax Commission*, 282 U. S. 1; *First National Bank of Boston* v. *Maine*, 284 U. S. 312.

nonresident decedents situated in the United States. *United States* v. *Bennett,* 232 U. S. 299, shows that the power of the Federal Government with respect to taxation is not limited to the same extent as the taxing power of the States. The implication to be drawn from that case and *Cook* v. *Tait,* 265 U. S. 47, is that where the Federal Government affords a benefit there is power to tax. It is desirable that the constitutional question be settled promptly, for stock in domestic corporations is specifically required to be included in the gross estate by Section 303 (d), and there are at least two pending cases involving estates of nonresidents which include property of that character. *Estate of John Joseph Garvan* v. *Commissioner,* 25 B. T. A. 612, now pending in the Circuit Court of Appeals for the First Circuit upon petitions for review filed by both the Government and the taxpayer, and *Marshal Stearns, Administrator of the Estate of Carl Richard Heironymus,* v. *United States,* now pending in the Court of Claims.

Wherefore, it is respectfully submitted that the petition should be granted.

THOMAS D. THACHER,
Solicitor General.

NOVEMBER, 1932.

APPENDIX

STATUTES AND REGULATIONS

Revenue Act of 1924, c. 234, 43 Stat. 253, 303, 304, 305:

SEC. 301. (a) In lieu of the tax imposed by Title IV of the Revenue Act of 1921, a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 303) is hereby imposed upon the transfer of the net estate of every decedent dying after the enactment of this Act, whether a resident or nonresident of the United States:

[Here follow the rates.]

(U. S. C., Title 26, Sec. 1092.)

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate;

* * * * *

(U. S. C., Title 26, Sec. 1094.)

SEC. 303. For the purpose of the tax the value of the net estate shall be determined—

* * * * *

(b) In the case of a nonresident, by deducting from the value of that part of his

gross estate which at the time of his death is situated in the United States—

* * * * *

(d) For the purpose of Part I of this title, stock in a domestic corporation owned and held by a nonresident decedent shall be deemed property within the United States, * * *.

(e) The amount receivable as insurance upon the life of a nonresident decedent, and any moneys deposited with any person carrying on the banking business, by or for a nonresident decedent who was not engaged in business in the United States at the time of his death, shall not, for the purpose of Part I of this title, be deemed property within the United States.

* * * * *

(U. S. C., Title 26, Sec. 1095.)

Treasury Regulations 68:

ART. 11. *Specific property to be included.*—The value of all real property situated in the United States and owned by the decedent at the date of his death should be included in the gross estate, whether the decedent was a resident or a nonresident, and whether the property came into the possession and control of the executor or administrator or passed directly to heirs or devisees. Where the decedent was a resident, the value of all personal property owned by him should be included, wherever situated. Where decedent was a nonresident, the value of so much of his personal property as had its situs in the United States at the time of his death should be included, and the value of his entire gross estate, wherever situated, should be disclosed, if deductions are claimed. (See Arts. 52 to 54.) As to the situs of the per-

sonal property of nonresident decedents, see Article 50.

* * * * *

ART. 50. *Situs of property of nonresident decedents.*—Real estate within the United States, stocks and bonds physically in the United States at date of death, moneys due on open accounts by domestic debtors, and stock of a corporation or association created or organized in the United States, constitute property having a situs in the United States. As to the meaning of the term "United States," see Article 5. On the other hand, insurance upon the life of a nonresident, and moneys deposited by or for a nonresident not engaged in business in the United States at the time of his death with any person (for meaning of the term "person," see section 2 (a) (1) of the statute) carrying on the banking business in the United States, are not to be regarded as property situated therein.

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1932

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Office Supreme Court
JAN 10 1933
CHARLES ELMORE CROPLEY

No. 496

In the Supreme Court of the United States

OCTOBER TERM, 1932

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ERNEST BROOKS, HAROLD WILSON BROOKS, AND WALTER DOUGLAS BROOKS, AS EXECUTORS OF THE WILL OF ERNEST AUGUSTUS BROOKS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 496

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

ERNEST BROOKS, HAROLD WILSON BROOKS, AND WALTER DOUGLAS BROOKS, as Executors of the Will of Ernest Augustus Brooks

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 12–22) is reported in 22 B. T. A. 71. The opinion of the Circuit Court of Appeals (R. 47–51) is reported in 60 F. (2d) 890.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered August 5, 1932. (R. 51.) The peti-

tion for certiorari was filed November 4, 1932, and granted December 5, 1932. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS INVOLVED

1. Whether, under Sections 301, 302, and 303 of the Revenue Act of 1924, the gross estate of a nonresident decedent should include the value of intangible property, the physical evidences of which are actually present in the United States.

2. If the statute requires the inclusion of such property, whether it contravenes the Constitution.

STATUTES AND REGULATIONS INVOLVED

These appear in the Appendix, *infra,* pp. 30–32.

STATEMENT

The facts found by the Board (R. 8–11) may be summarized as follows:

Respondents' decedent was a subject of Great Britain, and at the time of his death on October 31, 1924, was a resident of Cuba. At that time he owned securities which were located in New York City. (R. 8.) He was not then engaged in business in the United States (R. 8) and the securities were not pledged, hypothecated, or held as security for any indebtedness (R. 11). Some of the securities were in the possession of the decedent's son in New York City. (R. 11.) They had been held by him for several years, his father having asked him

to take charge of the securities, collect the interest, and deposit it to the decedent's account in a New York bank. (R. 38–39.)[1] The remainder of the securities were in the possession of Lawrence Turnure & Company, in New York City, which collected the income and placed it to the decedent's credit in a drawing account, against which the decedent from time to time drew checks. The Company made a charge for its services. (R. 11.)

The securities consisted of the following (R. 8–11):

Bonds of foreign corporations and accrued interest thereon	$24,384.97
Bonds of foreign governments and accrued interest thereon	55,610.49
Bonds of domestic corporations and accrued interest thereon	460,315.32
Bonds of a domestic municipality and accrued interest thereon	15,073.57
Stock in a foreign corporation	50,000.00

At the time of his death the decedent also had cash on deposit with Lawrence Turnure & Company, New York City, in the amount of $14,517.98. (R. 8.)

Under Cuban law no intervention of any court in Cuba was required for the administration and distribution of decedent's estate. Probate proceedings were initiated in New York in order to secure the release of certain assets. (R. 42.)[1]

The Commissioner included the above property in determining the value of that part of the gross estate of the decedent which at the time of his

[1] These facts are not included in the findings, but appear in the record at the pages cited.

death was situated in the United States. (R. 11.) The Board held that this property was erroneously included in the gross estate (R. 22) and its decision was affirmed by the court below (R. 47–50.)

SPECIFICATIONS OF ERROR

The Circuit Court of Appeals erred—

1. In failing to hold that the stocks, bonds, and cash on deposit were property situated in the United States within the meaning of Section 303 (b) of the Revenue Act of 1924.

2. In holding that the Revenue Act of 1924 did not require the inclusion in the gross estate of a nonresident decedent of the value of intangible property the physical evidences of which are actually present in the United States.

3. In affirming the decision of the Board of Tax Appeals.

SUMMARY OF ARGUMENT

I. The recent decisions of this Court dealing with the power of the States to tax intangibles of nonresidents have no bearing upon the question of the intent of Congress as expressed in the Revenue Act of 1924. The statute antedated these cases, the earliest of them being decided in 1930.

The court below conceded that in 1924 the state of the declared law would afford a good basis for the belief that Congress meant to include the intangibles here involved in the gross estate of a nonresident decedent. At that time the power to tax the transfer of intangibles at the place where the

physical evidence was kept was clearly recognized. The Treasury Regulations dealing with prior Revenue Acts, which were in effect when the Revenue Act of 1924 was adopted, treated intangibles as having a situs of their own. Under familiar rules the executive interpretation of the earlier statutes should be carried into the reenacted statute.

Moreover, the statute indicates on its face that Congress intended to reach the transfer of intangibles if they were physically located in the United States. Two classes of intangibles were expressly excluded from the gross estate, which indicates that all other intangibles similarly situated and not so excepted shall be deemed property within the United States.

The section dealing with domestic stocks was designed to insure their inclusion, whether within or without the United States. This express provision for the inclusion of domestic stock, regardless of the situs of the certificates, can not operate to exclude from the gross estate other intangibles situated in the United States as that phrase was understood when the statute was enacted.

II. The recent decisions of this Court dealing with the power of States to tax intangibles are not applicable here because the rule applied as between the States was adopted to avoid double taxation and to secure parity between tangibles and intangibles, neither of which considerations is important here. The rule applied to the States is based upon the

maxim *mobilia sequuntur personam*, but that is only a fiction of the law which is not of universal application. It is intended for convenience and is not controlling where justice does not demand it. It was invented to prevent escape from taxation and should not be employed otherwise. To apply it here would place intangibles upon a different basis from tangibles. The reason for the rule applied to the States must mark the extent of its application, and since the reasoning is not applicable here, the rule itself may be disregarded.

Moreover, the Federal Government is not limited in the same way as the States in selecting subjects for taxation, and the implication from the cases is that where the Federal Government affords a benefit there is power to tax. The property here involved enjoyed the protection of this Government, and unless the security and protection of the United States is to be made available to aliens on better terms than it is to citizens, the Federal Government must have the power to tax.

The securities in this case were all held as investments, and there is sufficient basis for the contention that the property had acquired a business situs in this country. Its complete enjoyment could be secured by merely keeping it safe and collecting the income, and the absence of other activities, which the character of the property did not demand, is not important.

ARGUMENT

I

THE REVENUE ACT OF 1924 TREATED INTANGIBLES THE EVIDENCES OF WHICH ARE PHYSICALLY PRESENT IN THE UNITED STATES AS PROPERTY SITUATED IN THE UNITED STATES

The Board of Tax Appeals and the court below held that Congress did not intend to include in the gross estate of a nonresident decedent situated in the United States those intangibles owned by him the physical evidences of which are actually present in the United States. The reason assigned by the Board of Tax Appeals for its conclusion was that, under the recent decisions of this Court holding that the situs of intangibles for the purpose of State taxation is at the domicile of the owner,[2] the Government's contention that the intangibles were property "situated in the United States" was unsound. The court below held that since the decisions upon which the Board relied were more recent than the statute, they could not aid in determining what Congress earlier meant by "property situated in the United States."

The court below reached its conclusion that the statute was not intended to embrace the property here involved from an analysis of the terms of the statute itself, although it conceded that (R. 49)—

[2] *Farmers' Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204; *Baldwin* v. *Missouri*, 281 U. S. 586; *Beidler* v. *South Carolina Tax Commission*, 282 U. S. 1; *First National Bank* v. *Maine*, 284 U. S. 312.

At least as to the bonds of domestic corporations, the state of the declared law in 1924 would afford a good basis for the belief that Congress meant to include the intangibles here involved in the gross estate situated in the United States of a nonresident decedent.

We submit that when the statute was enacted in June, 1924, Congress must have intended to include in the gross estate of nonresident decedents the value of intangibles physically located in the United States. In 1902 this Court had declared that the power to tax such property was well established. *Eidman* v. *Martinez,* 184 U. S. 578. In that case this Court considered the application of the inheritance tax imposed by the Act of June 30, 1898, c. 448, 30 Stat. 448, 464, to intangible property belonging to a nonresident alien. Although it was there decided that Congress had limited the application of that statute to transfers made under the laws of the States or Territories, and had thus excluded transfers under foreign laws, the power to tax the transfer of intangibles at the place where the physical evidence was kept was clearly recognized, this Court saying (p. 582):

> The question in each case is not of the power of the legislature to tax the personal property of nonresidents, both tangible and intangible, since that is well established both in England and America, *Mager* v. *Grima,* 8 How. 490, but of its intent to do so by the particular act in question.

That the existence of such power was then unquestioned is further shown by the decision of this Court in 1914 in *Wheeler* v. *Sohmer,* 233 U. S. 434. In that case an estate tax upon the transfer of promissory notes belonging to a nonresident but physically located in the taxing State was upheld, this Court saying (p. 439):

> As to authority, it has been asserted or implied again and again that the States had the power to deal with negotiable paper on the footing of *situs.*

In 1919, *DeGanay* v. *Lederer,* 250 U. S. 376, held that the income from stocks, bonds, and mortgages physically held in the United States by an agent under a power of attorney from a nonresident alien was within the reach of the income tax imposed by the Act of October 3, 1913, c. 16, Sec. II, A, 38 Stat. 166, "upon the entire net income from all property owned and of every business, trade, or profession carried on in the United States by persons residing elsewhere." It was held that such intangibles were property within the United States, and that the maxim *mobilia sequuntur personam* was inapplicable. Relying upon *Blackstone* v. *Miller,* 188 U. S. 189, this Court said (pp. 381–382):

> We have no doubt that the securities, herein involved, are property. Are they property within the United States? It is insisted that the maxim *mobilia sequuntur personam* applies in this instance, and that the situs of the property was at the domicile of

> the owner in France. But this court has frequently declared that the maxim, a fiction at most, must yield to the facts and circumstances of cases which require it; and that notes, bonds and mortgages may acquire a situs at a place other than the domicile of the owner, and be there reached by the taxing authority.

Until 1930, *Blackstone* v. *Miller, supra,* had been cited in this Court with approval many times. Although it was then overruled by *Farmers' Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204, that circumstance must be put out of view in determining the purpose of Congress in 1924 when the ruling in *Blackstone* v. *Miller* was law.

This being the state of the law in 1924, a tax imposed upon the transfer of property "situated in the United States" must be deemed to have been imposed upon intangibles which under the decisions of the Court had a situs here for the purposes of taxation. *Kepner* v. *United States,* 195 U. S. 100, 124. This Court has discerned a Congressional purpose to employ the power to tax income to its fullest extent (*Heiner* v. *Colonial Trust Co.,* 275 U. S. 232, 234–235), and it would be curious indeed if Congress should have withheld the full exercise of its power to tax the transfer of decedents' estates. In considering a statute fairly comparable to the one here involved, and certainly not more explicit, this Court held (in 1919) that the language "net income from all property owned * * * in

the United States by persons residing elsewhere," included the income from intangible property situated in the United States. *DeGanay* v. *Lederer, supra.*

Light is shed upon the meaning to be attributed to the pertinent language of the Revenue Act of 1924 by the construction put upon similar language of prior Revenue Acts by Treasury Regulations in effect at the time of the enactment of the Revenue Act of 1924. The Regulations then in effect construed similar language of the Revenue Acts of 1918 and 1921 as including bonds physically within the United States and moneys owing to foreign residents by domestic debtors.[3] In construing the reenacted statute its language should be interpreted in the light of this administrative construction, for if Congress had desired to exclude such property it would have made its purpose clear in its revision of the Revenue Act in 1924. *Heiner* v. *Colonial Trust Co., supra,* p. 235. Section 403 (b) of the Revenue Acts of 1918 and 1921 indicated the purpose to include in the gross estate of a nonresident decedent "the value of that part of his gross estate which at the time of his death is situated in the United States." This language was reenacted in the Revenue Act of 1924, and Treasury Regulations 68, Article 50, issued thereunder provided as follows:

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[3] Article 60, Regulations 37; Article 53, Regulations 63.

> **Real estate within the United States, stocks and bonds physically in the United States at date of death, moneys due on open accounts by domestic debtors, and stock of a corporation or association created or organized in the United States, constitute property having a situs in the United States.**

Article 50, Regulations 70 (1926 Edition), applicable to the Revenue Act of 1926, and Article 50, Regulations 70 (1929 Edition), applicable to the Revenue Acts of 1926 and 1928, have added bills, notes, and mortgages to the list of intangibles having a situs in the United States. These Regulations have been impliedly sanctioned by the repeated reenactment of the statute.[4] Upon well-settled principles these Regulations have the force of law and are not to be disregarded without cogent reasons. *National Lead Co.* v. *United States*, 252 U. S. 140, 146; *Brewster* v. *Gage*, 280 U. S. 327, 337.

Thus bonds have consistently been included in the gross estates of nonresident decedents in all the Regulations, beginning with those issued under the Revenue Act of 1918. Bonds comprise the main portion of the estate in this case, and the reenactment of the statute in the light of this consistent administrative practice is convincing evidence that Congress intended that they should be treated as property in the United States.

[4] Section 403 (b), Revenue Acts of 1918 (c. 18, 40 Stat. 1057, 1098) and 1921 (c. 136, 42 Stat. 227, 279); Section 303 (b), Revenue Acts f 1924 (*infra*, p. 30) and 1926 (c. 27, 44 Stat. 9, 305; U. S. C. App., Title 26, Sec. 1095).

Although stock of a foreign corporation was first included in the Regulations under the Revenue Act of 1924, the prior Regulations did not expressly limit the estate tax to the class of intangible property therein mentioned and thus did not inferentially exclude such stock. The 1924 Regulations in turn have been impliedly sanctioned by the reenactment of the statute to which they relate, and thus the failure of the earlier Regulations to mention stock of foreign corporations can not limit the purpose of Congress to tax all property within its reach.[5]

Not only does the reenactment of the statute indicate Congressional approval of its settled administrative construction but there is evidence within the statute itself that Congress intended to reach the transfer of intangibles belonging to nonresident decedents.

Section 303 (e) provides that the proceeds of insurance policies upon the lives of nonresident decedents and moneys deposited with any person carrying on the banking business by or for a nonresident decedent who was not engaged in business in the United States shall not be deemed property within the United States. This express exception of certain intangibles physically present in the United States implies that other intangibles simi-

[5] In *Shenton* v. *United States*, 53 F. (2d) 249 (S. D. N. Y.), it was said that it would probably be unwise to place much reliance upon the Regulations. However, that case dealt solely with stock of a foreign corporation.

larly situated and not so excepted shall be deemed to be property situated within the United States. Whatever may have been the reason for the exception, the fact is that Congress realized the necessity of an exception to exclude them from Section 303 (b) and did not exclude bonds and stocks.

Section 303 (d) is not inconsistent with the construction which we suggest. It provides that "stock in a domestic corporation owned and held by a nonresident decedent shall be deemed property within the United States." The court below thought that under the maxim *expressio unius est exclusio alterius* the express inclusion of such intangibles implies the exclusion of others. But the place where the stock was held was not an element in the application of Section 303 (d) which was designed to insure the inclusion of domestic stock, whether physically present in the United States or not. The failure to include other intangibles in Section 303 (d) can not therefore be said to exclude them from 303 (b). Apparently Congress intended that stock in a domestic corporation *wherever held* by a nonresident should be deemed property within the United States, and in accordance with the maxim *expressio unius est exclusio alterius* did not intend that other intangibles held by nonresidents *outside* the United States should be deemed property within the United States. The intangibles in this case were all held in the United States and the maxim has, we submit, no proper application.

This conclusion finds support in the construction put upon Section 202 (c) of the Revenue Act of 1916 (c. 463, 39 Stat. 756), of which Section 303 (d) of the Revenue Act of 1924 is a counterpart. See Treasury Decision 2530. The 1924 Act was similarly interpreted. See Article 50, Regulations 68. The fact that Section 303 (d) was specifically limited to Part I of Title III and was not extended to Part II, which imposed the gift tax, is significant. By Section 319 of Part II (U. S. C., Title 26, Sec. 1131) a tax was imposed "upon the transfer by a nonresident by gift during such calendar year of any property situated within the United States." Unless by Section 303 (d) Congress meant to include in the taxable estate of a nonresident decedent domestic stocks *wherever situated,* no reason is apparent for its not likewise having applied the provision to the gift tax. It is only because Congress meant to extend the estate tax provision to such stock *wherever situated,* and to limit the gift-tax provision to property situated *within the United States,* that it confined the operation of Section 303 (d) to the former.

The Regulations under the gift tax provide as follows with respect to situs (Article 18, Regulations 67):

> *Situs of property.*—The situs of property, both real and personal, for the purpose of the tax is its actual situs. The actual situs of mortgages, bonds, bills and notes, and

> certificates of stock in any corporation or association wherever created or organized is the place where held.

Although the gift tax rates were changed by Section 324 of the Revenue Act of 1926 (c. 27, 44 Stat. 9; U. S. C. App., Title 26, Sec. 1121), no change was made in describing the character of transfers to be taxed. Thus Congress once again sanctioned a regulation dealing with intangibles within the United States upon the footing of situs. Because the gift tax supplements the estate tax the two are *in pari materia*, and Congress must have intended that the same basis as to situs should be applied to the estate tax.

Reading the statute as it must have been understood when enacted, we submit it should be construed to require the inclusion in the gross estate of a nonresident decedent of certificates of stock, bonds, and cash deposits within the United States.

II

THE STATUTE AS SO CONSTRUED IS CONSTITUTIONAL

It appears from the concurring opinion in the court below (R. 51) that at least one of the judges rejected the construction of the statute suggested by the Government solely because he believed the construction for which we contend would raise a grave constitutional question. This doubt is occasioned by recent decisions of this Court holding that for the purpose of death taxes imposed by the States the situs of intangibles is at the domicile of

the owner. Under these decisions intangible property is protected from double taxation as fully as is tangible personalty, and hence must be taxed, if at all, at the domicile of the owner. This rule was predicated upon the due process clause of the Fourteenth Amendment, and the question arises whether the like clause in the Fifth Amendment precludes taxation by the Federal Government of intangibles owned by nonresidents.

The recent decisions of this Court relating to death taxes imposed by the States upon intangibles clearly mark a distinction which we believe is controlling here. In *First National Bank* v. *Maine*, 284 U. S. 312, it was plainly stated that the reason which actuated this Court in departing from the rule that intangibles have a situs of their own was to avoid multiple taxation by the States and to secure parity between tangibles and intangibles. This Court there said (pp. 326–327):

> The rule of immunity from taxation by more than one state, deducible from the decisions in respect of these various and distinct kinds of property, is broader than the applications thus far made of it. In its application to death taxes, the rule rests for its justification upon the fundamental conception that the transmission from the dead to the living of a particular thing, whether corporeal or incorporeal, is an event which can not take place in two or more states at one and the same time. In respect of tangible property, the opposite view must be re-

> jected as connoting a physical impossibility; in the case of intangible property, it must be rejected as involving an inherent and logical self-contradiction. Due regard for the processes of correct thinking compels the conclusion that a determination fixing the local situs of a thing for the purpose of transferring it in one state, carries with it an implicit denial that there is a local *situs* in another state for the purpose of transferring the same thing there. The contrary conclusion as to intangible property has led to nothing but confusion and injustice by bringing about the anomalous and grossly unfair result that one kind of personal property can not, for the purpose of imposing a transfer tax, be within the jurisdiction of more than one state at the same time, while another kind, quite as much within the protecting reach of the Fourteenth Amendment, may be, at the same moment, within the taxable jurisdiction of as many as four states, and by each subjected to a tax upon its transfer by death, an event which takes place, and in the nature of things can take place, in one of the states only.

In order to resolve the confusion and to prevent the injustice referred to by this Court, the maxim *mobilia sequuntur personam* was applied. Upon similar reasoning the Supreme Court of Indiana *declined to apply the maxim* and held that intangibles which had acquired a business situs in Illinois were not taxable at the domicile of the owner in

Indiana. *Miami Coal Co.* v. *Fox*, 176 N. E. 11 (Ind.). The question whether the States are prohibited from taxing intangibles which have acquired a business *situs* in a State other than that of the owner's domicile was specifically reserved in *First National Bank* v. *Maine, supra*, p. 331. However, it has been held that the limitation of the Fourteenth Amendment upon the power of a State to tax the property of its residents which has acquired a permanent situs outside the State does not apply to intangible property, even though it has acquired a business situs and is taxable in another State. *Cream of Wheat Co.* v. *Grand Forks*, 253 U. S. 325. Furthermore, this Court denied certiorari (284 U. S. 625) in *Hill* v. *Carter*, 47 F. (2d) 869 (C. C. A. 9th), where the holding of the court below was that the income accruing to a resident of Hawaii growing out of certain stocks and bonds and bank deposits in New York City was not subject to the Hawaiian income tax. In this situation we think it is evident that the Constitution contains no inexorable principle which requires the unwavering application of the maxim *mobilia sequuntur personam*, but that its application is necessary only where there is need to avoid multiple taxation as between the States. This view is in accord with earlier decisions of this Court, for it has long been recognized that the maxim is but a fiction of the law, that it is not of universal application but intended for convenience, and that it is not controlling where justice does not demand it. *Safe Deposit & T. Co.* v. *Virginia*, 280 U. S. 83, 92.

In *Green* v. *Van Buskirk*, 7 Wall. 139, 150, it was said that this fiction always yields to laws for attaching estates of nonresidents, because such laws necessarily assume that property has a situs entirely distinct from the owner's domicile. See also *St. Louis* v. *The Ferry Co.*, 11 Wall. 423, 430.

It is also true that shares of corporate stock and corporate bonds are treated for tax purposes as property entirely distinct and independent from the property of the issuing corporations. *Bank of Commerce* v. *Tennessee*, 161 U. S. 134, 146; *Dewing* v. *Perdicaries*, 96 U. S. 193, 196; *Wright* v. *Georgia R. R. & Banking Co.*, 216 U. S. 420, 425; *Commissioner* v. *S. A. Woods Machine Co.*, 57 F. (2d) 635 (C. C. A. 1st), certiorari denied October 10, 1932; *United States* v. *Kirby Lumber Co.*, 284 U. S. 1. Accordingly, we submit that a legal fiction, devised to prevent personalty from escaping just taxation (*Safe Deposit & T. Co.* v. *Virginia, supra*, p. 94), should not be given such general application as to prevent Congress from dealing with intangibles situated within the United States on the same basis as any other property within the territorial reach of our laws. The Constitution does not stand in the way unless this sovereign power be exercised in violation of the Fifth Amendment, which has been aptly characterized as an admonition of fair dealing (*Cohan* v. *Commissioner*, 39 F. (2d) 540 (C. C. A. 2d). The only Federal taxing statutes which have fallen before the due process clause have been

those which were deemed to be an arbitrary and capricious exercise of the taxing power. See *Heiner* v. *Donnan,* 285 U. S. 312. Property within the reach of the sovereign power of taxation may not escape taxation when Congress has declared that it shall be taxed. In such cases maxims must be laid aside as "amiable fiction," as was done in *Tyler* v. *United States,* 281 U. S. 497, 503.

The power to tax tangibles is exclusively in the State where the property has an actual situs, and the maxim *mobilia sequuntur personam* does not apply to such property. *Frick* v. *Pennsylvania,* 268 U. S. 473. It has been shown that the maxim is applicable to intangibles so far as the power of the States is concerned, and thus parity is secured between tangibles and intangibles and each class is taxable in only one State. But in considering a tax levied by the Federal Government, parity between tangibles and intangibles will not be secured unless the maxim is disregarded in dealing with both classes of property. Tangible property physically within the United States is undoubtedly property situated within the United States, even though it belong to a nonresident decedent. If intangible property such as bonds, certificates of stock, and cash on deposit physically within the United States is not treated as property situated in the United States then intangible property of a nonresident which enjoys the same protection of this Government as tangibles will be given preferential

treatment. Thus if the test be equal treatment of the two classes of property, the challenge of the tax in this case must fail.

No valid objection can be made to this tax on the ground that it will result in double taxation, because historically the taxing of the same property by one State and the Federal Government has never been regarded as an evil. Both the Federal Government and the States have the power to tax transfers or successions in case of death. *Willcuts* v. *Bunn,* 282 U. S. 216, 226. Both the Federal Government and the States impose taxes upon the same income. Imports are within the taxing power of Congress, and property when imported and commingled with the goods of a State is again exposed to taxation. This subject was considered in *Knowlton* v. *Moore,* 178 U. S. 41, where it was said (p. 60):

> Under our constitutional system both the National and the state governments, moving in their respective orbits, have a common authority to tax many and diverse objects, but this does not cause the exercise of its lawful attributes by one to be a curtailment of the powers of government of the other, for if it did there would practically be an end of the dual system of government which the Constitution established.

Nor is international double taxation to be regarded as an evil against which the Constitution affords protection. While the States are required to

give full faith and credit to the laws of every other State, no country ever takes notice of the revenue laws of another. *Holman* v. *Johnson,* 1 Cowp. 341, cited in Hanson's Death Duties (6th ed.), p. 142. International double taxation is not uncommon (see *Farmers' Loan & Trust Co.* v. *Bowers* (S. D. N. Y.), decided July 7, 1931, reported in 313 C. C. H. 8877); it is a political question with which the courts do not concern themselves. This Court referred to international double taxation as an evil in *Burnet* v. *Chicago Portrait Co.,* 285 U. S. 1, but it was not suggested that the Constitution provided any remedy against it. It is clear enough that the recent cases applying the maxim *mobilia sequuntur personam* to State taxation of intangibles proceed upon the principle "that the right of one State to tax may depend somewhat upon the power of another so to do." *Farmers' Loan & Trust Co.* v. *Minnesota, supra,* p. 211. Plainly there is no such limitation upon the powers of independent nations. Where, as in this case, the intangibles are owned by the subject of a foreign country who does not reside within the United States, they must be taxed if taxed at all at their physical situs and so far as the States and the United States are concerned may not be taxed at the domicile of the owner. We find nothing in the decisions of the Court which prevent State and Federal taxation at the place of their physical situs.

So far as the Fifth Amendment is concerned, it is clear that the power of the Federal Government

with respect to taxation is not restrained to the same extent as the taxing power of the States. This is apparent from what this Court said in *United States* v. *Bennett,* 232 U. S. 299, 305–306:

> But the misapprehension consists not in a misconception as to what the cases relied on decided, but in taking for granted that because the doctrine stated has been applied and enforced in many decisions with respect to the taxing power of the States, that the same principle is applicable to and controlling as to the United States in the exercise of its powers. * * * The application to the States of the rule of due process relied upon comes from the fact that their spheres of activity are enforced and protected by the Constitution and therefore it is impossible for one State to reach out and tax property in another without violating the Constitution, for where the power of the one ends the authority of the other begins. But this has no application to the Government of the United States so far as its admitted taxing power is concerned. It is coextensive with the limits of the United States; it knows no restriction except where one is expressed in or arises from the Constitution and therefore embraces all the attributes which appertain to sovereignty in the fullest sense. Indeed the existence of such a wide power is the essential resultant of the limitation restricting the States within their allotted spheres, for if it were not so then government in the plenary and usual acceptation of

> that word would have no existence. Because the limitations of the Constitution are barriers bordering the States and preventing them from transcending the limits of their authority and thus destroying the rights of other States and at the same time saving their rights from destruction by the other States, in other words of maintaining and preserving the rights of all the States, affords no ground for constructing an imaginary constitutional barrier around the exterior confines of the United States for the purpose of shutting that government off from the exertion of powers which inherently belong to it by virtue of its sovereignty.

The *Bennett case* was followed in *Cook* v. *Tait*, 265 U. S. 47, where it was held that Congress has power to impose a tax upon income received by a native citizen of the United States who at the time the income was received was permanently residing and domiciled in Mexico, and notwithstanding that the income arose from real and personal property in Mexico. In deciding that the situs of the property was not important, this Court said (p. 56):

> * * * the basis of the power to tax was not and can not be made dependent upon the situs of the property in all cases, it being in or out of the United States, and was not and can not be made dependent upon the domicile of the citizen, that being in or out of the United States, but upon his relation as citizen to the United States and the relation of the latter to him as citizen.

The implication from *United States* v. *Bennett* and *Cook* v. *Tait, supra,* is that where the Federal Government affords protection, there is power to tax, limited for practical purposes only by its power to enforce its collection. Although a nonresident alien is involved in the instant case instead of a citizen, it is evident that the same protective relationship exists here because the property of the alien physically in the United States is enjoying the protection of this Government. Doubtless that is one of the reasons why it is here. The security and protection of the United States should not be available to aliens on better terms than it is to citizens. Since the World War the flight of capital from foreign countries for safe-keeping in the United States has been a matter of common knowledge. When an alien seeks a safe harbor for his property in the United States and brings it under the protection of the United States, he should not be permitted to evade the exercise of the sovereign power of taxation by invoking the fiction that the legal situs of the property is at the very domicile from which he has designedly removed it.

Taxes are a portion which each individual gives of his property in order to secure the perfect enjoyment of the remainder. It is the price and consideration paid for the protection afforded. When the property of an individual receives the protection of the United States, it is equally right that the property protected, whether real or personal, and

no matter where the owner has his domicile, should yield a compensation or consideration. Taxes are no more to be levied upon the property of the resident to protect the property of the nonresident than upon the property of the nonresident to protect that of the resident. Desty on Taxation, Vol. 1, p. 53.

Other countries do not permit the maxim *mobilia sequuntur personam* to be invoked in favor of nonresidents so as to place their property, actually in the country, beyond the reach of the taxing power. Hanson's Death Duties (6th ed.), p. 2. Bonds of foreign governments and certificates of shares in a foreign company have been held to be situated in England for the purposes of the death duty. See Hanson's Death Duties (6th ed.), p. 109, where it is said:

> The rule as to the locality of such assets to be gathered from these cases seems to be that they are situate within the jurisdiction where they are found, unless they are incapable of realization without the doing of some act outside that jurisdiction, in which latter case they will be held to be situate within the jurisdiction where such act has to be done.

The property in this case falls into three classes: (1) bonds of foreign corporations and foreign governments and stock in a foreign corporation; (2) bonds of domestic corporations and of a domestic municipality; (3) cash on deposit.

The domestic character of property of the second class was one of the grounds relied upon to justify the conclusion that the property involved in *De-Ganay* v. *Lederer, supra,* was completely localized in the United States.

The property in the third class consists of cash on deposit with an agent in New York City. The Board did not find and the evidence does not indicate that this agent was in the banking business, and thus this class of property is not brought within the exception in Section 303 (e) of the statute. Like the property in the second class, this cash is domestic property and the decedent depended upon the local law to enforce his right to it.

At the time of his death the decedent had retired from business. (R. 7.) All of the intangibles were investments, and their safe-keeping and the collection of the income were the only activities required in connection with property of that character. Under the circumstances it would appear that there is a sufficient basis for the contention that all of the property here involved had acquired a business situs in New York City. This Court has declared that "Intangible personal property may acquire a taxable situs where permanently located, employed and protected" (*Safe Deposit & T. Co.* v. *Virginia, supra,* p. 93); but where property is of such a character that its complete enjoyment may be secured by merely keeping it in a safe place and collecting the income, it would appear to be unreasonable to deny

a business situs because of the absence of activities which the character of the property did not demand.

In *New Orleans* v. *Stempel*, 175 U. S. 309, a tax on credits evidenced by notes and secured by mortgages was upheld where the owner, a nonresident who had inherited the property, left them in Louisiana in the possession of an agent who collected the same as they fell due and deposited the proceeds in a local bank to the credit of the owner. This case was referred to in *Farmers' Loan & Trust Co.* v. *Minnesota, supra,* p. 213, as having depended upon a business situs. There was no element of investment and reinvestment of capital in the *Stempel case,* and the facts which supported a business situs there are also present in the case at bar.

CONCLUSION

It is respectfully submitted that the Estate Tax provisions of the Revenue Act of 1924 were intended to reach intangibles physically present in the United States, and that the inclusion of the property here involved in the gross estate of a nonresident decedent contravenes no provision of the Constitution. The decision of the Circuit Court of Appeals is erroneous and should be reversed.

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JANUARY, 1933.

APPENDIX

STATUTES AND REGULATIONS

Revenue Act of 1924, c. 234, 43 Stat. 253, 303, 304, 305:

> SEC. 301. (a) In lieu of the tax imposed by Title IV of the Revenue Act of 1921, a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 303) is hereby imposed upon the transfer of the net estate of every decedent dying after the enactment of this Act, whether a resident or nonresident of the United States:
>
> [Here follow the rates.]
>
> (U. S. C., Title 26, Sec. 1092.)
>
> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> (a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate:
>
> * * * * *
>
> (U. S. C., Title 26, Sec. 1094.)
>
> SEC. 303. For the purpose of the tax the value of the net estate shall be determined—
>
> * * * * *
>
> (b) In the case of a nonresident, by deducting from the value of that part of his

gross estate which at the time of his death is situated in the United States—

* * * * *

(d) For the purpose of Part I of this title, stock in a domestic corporation owned and held by a nonresident decedent shall be deemed property within the United States, * * *.

(e) The amount receivable as insurance upon the life of a nonresident decedent, and any moneys deposited with any person carrying on the banking business, by or for a nonresident decedent who was not engaged in business in the United States at the time of his death, shall not, for the purpose of Part I of this title, be deemed property within the United States.

* * * * *

(U. S. C., Title 26, Sec. 1095.)

Treasury Regulations 68:

ART. 11. *Specific property to be included.*—The value of all real property situated in the United States and owned by the decedent at the date of his death should be included in the gross estate, whether the decedent was a resident or a nonresident, and whether the property came into the possession and control of the executor or administrator or passed directly to heirs or devisees. Where the decedent was a resident, the value of all personal property owned by him should be included, wherever situated. Where decedent was a nonresident, the value of so much of his personal property as had its situs in the United States at the time of his death should be included, and the value of his entire gross estate, wherever situated, should be disclosed, if deductions are claimed. (See Arts. 52 to 54.) As to the situs of the per-

sonal property of nonresident decedents, see Article 50.

* * * * *

ART. 50. *Situs of property of nonresident decedents.*—Real estate within the United States, stocks and bonds physically in the United States at date of death, moneys due on open accounts by domestic debtors, and stock of a corporation or association created or organized in the United States, constitute property having a situs in the United States. As to the meaning of the term "United States," see Article 5. On the other hand, insurance upon the life of a nonresident, and moneys deposited by or for a nonresident not engaged in business in the United States at the time of his death with any person (for meaning of the term "person," see section 2 (a) (1) of the statute) carrying on the banking business in the United States, are not to be regarded as property situated therein.

* * * * *

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IN THE

Supreme Court of the United States

OCTOBER TERM—1932.

DAVID BURNET, Commissioner of Internal Revenue,
Petitioner,

vs.

ERNEST BROOKS, HAROLD WILSON BROOKS and WALTER DOUGLAS BROOKS, as executors of the will of ERNEST AUGUSTUS BROOKS,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The Solicitor-General, on behalf of the Commissioner of Internal Revenue, seeks a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit, entered in the above case on August 5th, 1932 (R., 49-50).

Opinions Below.

The opinion of the Board of Tax Appeals (R., 11-21) is reported in 22 B. T. A., 71.

The opinion of the Circuit Court of Appeals (R., 49) is reported in 60 Fed., 2nd, 890, Advance Sheets No. 4.

Question Presented.

The petitioner states that this question is whether under Sections 301, 302 and 303 of the Revenue Act of 1924 the gross estate of a non-resident decedent should include the value of intangible property, the physical evidences of which are actually present in the United States.

The opinion of the Court below shows that a more accurate statement of the issues which it determined is:

(1) Whether or not the estate tax imposed by the Revenue Act of 1924 applies (a) to shares of stock in a foreign corporation and (b) to bonds of foreign corporations, bonds of foreign governments, bonds of domestic corporations and bonds of domestic municipalities, owned by a *non-resident alien decedent*, not engaged in business in the United States at the time of his death, where the paper evidences of such securities were located within the United States at the time of his death; and

(2) Whether or not the estate tax imposed by the Revenue Act of 1924 applies to a deposit by a *non-resident alien decedent*, not engaged in business in the United States at the time of his death, with the firm of Lawrence Turnure & Company, New York City.

Statement of Facts.

The respondents are the duly named, qualified and acting executors of the estate of Ernest Augustus Brooks, who died on October 31st, 1924 (R., 3 and 6, Petition and Answer below).

At the time of his death, Ernest Augustus Brooks was a resident of Cuba, and a citizen of Great Britain (R., 3 and 6, Petition and Answer below). He was not engaged in business within the United States (R., 8, Findings of Fact).

The decedent's last will and testament was executed in Cuba and filed in accordance with the Cuban statutes with a Cuban notary public. The respondents were named as executors in that will, which contained a direction, permissible under Cuban law, that administration of the estate be carried on without judicial intervention (R., 38-40).

At the time of his death, the decedent was the owner of shares of corporate stock and bonds as follows (R., 8, Findings of Fact; full list with values shown at R., 8, 9, 10 and 11):

Bonds of foreign corporations and accrued interest thereon of an aggregate value of	$ 24,384.97
Bonds of foreign governments and accrued interest thereon of an aggregate value of	55,610.49
Bonds of domestic corporations and accrued interest thereon of an aggregate value of	460,315.32
Bonds of a domestic municipality and accrued interest thereon of an aggregate value of	15,073.57
Stock in a foreign corporation of an aggregate value of	50,000.00

The paper evidences of part of the foregoing securities were in the possession of decedent's son, Ernest Brooks, in New York City. He collected the income therefrom and deposited the same in his father's bank account (R., 11, 33, 36).

The paper evidences of the remaining securities were in the possession of Lawrence Turnure & Company, in New York City. That firm collected the income therefrom and kept the same on deposit subject to decedent's check (R., 11, 33, 36).

These securities were not pledged, and were not held as security for any indebtedness (R., 11, 33, 35, 36).

The 666 shares of capital stock of the Central Romelie S. A. Cuba Joint Stock Co. were shares of stock in a Cuban corporation, organized under the laws of Cuba, operating a sugar business in Cuba (R., 33).

The foregoing securities were all included by the petitioner in the gross estate of the decedent (R., 11, Findings of Fact).

At the time of his death, decedent had a deposit account with the firm of Lawrence Turnure & Company, New York City. For some years prior to his death it was his custom to draw checks against that account, and such checks were honored by Lawrence Turnure & Company (R., 36, 37). The balance of $14,517.98 on deposit at the date of death was included by the petitioner in the gross estate of the decedent (R., 11, Findings of Fact).

The petitioner claimed a deficiency in estate tax of $24,865.88 based upon the inclusion of the foregoing items of property in the taxable estate (R., 5). The Board of Tax Appeals held that none of the foregoing securities or the foregoing deposit was properly included in the taxable gross estate and redetermined a deficiency of $1.79 (R., 21). The Court below has affirmed in all respects the holding of the Board of Tax Appeals (R., 49-50).

The Reasons for Denying the Writ.

The determination of the Court below is not in conflict with any decision of this Court or of any other Circuit Court of Appeals. It is in conformity with every other reported decision on the matters involved.

Estate of J. J. Garvan vs. *Commissioner,* 25 B. T. A., 612;

Shenton Executor vs. *United States,* 53 Fed., 2nd, 249;
Sanchez vs. *Bowers,* 57 Fed., 2nd, 324.

While, as urged by the petitioner, it may be that large amounts of money are involved in similar situations, that fact alone furnishes no reason for granting the writ herein, and it is not necessarily the fact that much litigation will follow the decision below if it is allowed to stand. As is hereafter shown, the Circuit Court of Appeals has correctly disposed of the issues in the case at bar and acceptance by the petitioner of such disposition would mean no further litigation except in cases presenting distinguishing features.

The petitioner is mistaken in his contention that the construction of the statute adopted by the Court below defeats the apparent purpose of Congress.

The relevant portions of that statute (Revenue Act of 1924, c. 234, 43 Stat., 253) are as follows:

> "Sec. 301. (a) In lieu of the tax imposed by Title IV of the Revenue Act of 1921, a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 303) is hereby imposed upon the transfer of the net estate of every decedent dying after the enactment of this Act, whether a resident or non-resident of the United States:
>
> (Here follow the rates.)
>
> Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> (a) To the extent of the interest therein of the decedent at the time of his death which after his

death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate;

* * * * * *

Sec. 303. For the purpose of the tax the value of the net estate shall be determined—

* * * * * *

(b) In the case of a non-resident, by deducting from the value of that part of his gross estate which at the time of his death is situated in the United States—

* * * * * *

(d) For the purpose of Part I of this title, stock in a domestic corporation owned and held by a non-resident decedent shall be deemed property within the United States, * * *.

(e) The amount receivable as insurance upon the life of a non-resident decedent, and any moneys deposited with any person carrying on the banking business, by or for a non-resident decedent who was not engaged in business in the United States at the time of his death, shall not, for the purpose of Part I of this title, be deemed property within the United States. * * *"

Bearing in mind that the intangible property here involved consists of bonds of foreign corporations, foreign governments, domestic corporations, and a domestic municipality, stock in a foreign corporation, and monies due from a domestic debtor, the question presented to the Court below was:

Was any of the foregoing property owned by this non-resident decedent at the time of his death "situated in the United States"?

In considering this question a sharp distinction must be made between cases involving (a) the *common law rules* as to the situs of intangible property and those involving (b) *the power of a government to modify* the common law rules by statute. The phrase "situated in the United States" must be construed in the light of the common law rules, since Congress has in no way defined that phrase or attempted to modify the common law rules in so far as the property involved in the case at bar is concerned.

The common law rules with reference to the situs of property for purposes of taxation have been clearly established for many years, and have undergone only slight modification. Originally two rules were applied:

(a) Real property had its situs for taxation exclusively in the jurisdiction where it was located;

(b) Personal property, under the rule of *mobilia sequuntur personam* had its situs for taxation exclusively *at the domicile of its owner.*

The only modification of these two basic rules is one applying to *tangible personal property,* under which such property has a situs for taxation exclusively in the jurisdiction where it is located.

> *Frick* vs. *Pennsylvania,* 268 U. S., 473; 69 L. Ed., 1058.

As a result of this decision, the basic rules may now be stated as follows:

(a) *Tangible property* has its situs for taxation exclusively in the jurisdiction where it is located;

(b) *Intangible property* has its situs for taxation exclusively *at the domicile of its owner.*

Clearly, in the absence of a statute modifying these rules they are controlling, and they always have been except for the one modification above mentioned.

Railroad Company vs. *Pennsylvania* (*State Tax on Foreign-Held Bonds*), 15 Wall., 300; 21 L. Ed., 179;
Kirtland vs. *Hotchkiss,* 100 U. S., 491; 25 L. Ed., 558;
New Orleans vs. *Stempel,* 175 U. S., 309; 44 L. Ed., 174.

In *Railroad Company* vs. *Pennsylvania* (supra), cited with approval by Mr. Justice McReynolds in a majority opinion in *Farmers Loan & Trust Company* vs. *Minnesota,* 280 U. S., 204, the following appears at page 320:

> "But debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense; they are obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. To call debts property of the debtors, is simply to misuse terms. All the property there can be, in the nature of things, in debts of corporations, belongs to the creditors, to whom they are payable, and follows their domicil, wherever that may be. *Their debts can have no locality separate from the parties to whom they are due.* This principle might be stated in many different ways, and supported by citations from numerous adjudications,

but no number of authorities and no forms of expression could add anything to its obvious truth, which is recognized upon its simple statement." (Italics ours.)

In *Kirtland* vs. *Hotchkiss* (supra), the State of Connecticut imposed a transfer tax on a debt owing to a resident of Connecticut by a resident of Illinois and secured by a mortgage on property situated in Illinois. The Supreme Court held that the tax was properly imposed because the debt was property in the hands of the creditor and was situated at the place of his domicile, namely, Connecticut.

In commenting on *Kirtland* vs. *Hotchkiss* (supra), the Supreme Court in *New Orleans* vs. *Stempel* (supra), stressed the necessity of a specific statutory provision in order to create a situs other than the domicile of the creditor in the following language at page 321:

> "It was assumed that the situs of such intangible property as a debt evidenced by bond was at the domicil of the owner. *There was no legislation attempting to set aside that ordinary rule in respect to the matter of situs.*" (Italics ours.)

The rules above enunciated apply equally to all forms of intangible property, including choses in action, shares of stocks and bonds.

> *Rhode Island Hospital Trust Company* vs. *Doughton*, 270 U. S., 69; 70 L. Ed., 475.

No distinction is made between specialty debts on the one hand and simple contract debts on the other.

> *Blodgett* vs. *Silberman*, 277 U. S., 1; 72 Law. Ed., 749.

In the light of the foregoing discussion, it is obvious that none of the property involved in the case at bar was "situated in the United States" at the time of the testator's death under the common law rules, and it is equally obvious that Congress has not attempted by the statute to create a situs for any of such property within the United States. The very provisions of the statute, which the petitioner argues evidence such an attempt (Petition, pp. 7 and 8), clearly show the contrary.

(1) It is provided in Section 303 (d) that stock in a domestic corporation *shall* be deemed property within the United States. No similar provision is made as to stocks in foreign corporations or bonds. The express inclusion of the one class of property obviously implies the exclusion of the others. *Expressio unius est exclusio alterius.* The argument of the petitioner that by the provision last referred to Congress intended to add to all intangibles, paper evidences of which are within the United States, the stock of domestic corporations, irrespective of the location of the certificates of stock, provokes the comment that if this were indeed the Congressional intent the language used is singularly inappropriate for the purpose. On petitioner's theory stock in a domestic corporation is "situated in the United States" if the stock certificates are here. If this be so, then what Congress would have done in order to bring all stock in domestic corporations within the statute would have been to insert a provision that stock in domestic corporations shall be deemed property within the United States in cases where the stock certificates are located elsewhere.

(2) It is provided in Section 303 (e) that "the amount receivable as insurance upon the life of a non-resident decedent shall *not* be deemed property within the United States."

The petitioner argues that the express exclusion of insurance (a type of intangible personal property) even though the debtor or the insurance policy might be in the United States, indicates an intent upon the part of Congress that intangible personal property generally should be included where the debtor, or the paper evidence of the debt is in the United States. This argument carries no weight when consideration is given to the history of this section, which was first introduced in the Revenue Act of 1921 as Section 403 (b) (3) of that Act, to *repeal* the following provision contained in Section 403 (b) (3) of the Revenue Act of 1918:

> "The amount receivable as insurance upon the life of a non-resident decedent, where the insurer is a domestic corporation, shall be deemed property within the United States."

There can be no doubt on this point, in view of the report of the Committee on Finance (Report No. 275, 67th Congress, First Session), with respect to the Revenue Act of 1921, which contains the following statement on page 25:

> "Section 403 (b) (3). Under existing law the proceeds of insurance upon the life of a non-resident decedent, where the insurer is a domestic company, is deemed property within the United States. This has been found to place American insurance companies at a disadvantage in competing with foreign companies, and, in order to remedy this situation, the proposed bill expressly states that such insurance shall not be regarded as property situated in the United States."

In the light of this history of Section 303 (e) of the Revenue Act of 1924, it is evident that Congress re-

garded a tax upon insurance upon the life of a non-resident decedent as an *exception* to the general rule; otherwise, it would not have enacted the provision above quoted from the Revenue Act of 1918. In singling out such insurance and imposing a tax thereon, Congress must have intended to exclude from taxation all other intangible personal property belonging to non-resident decedents, whether or not the debtor or the evidence of the debt was in the United States. It seems clear that if Congress had intended to include and subject to taxation such other intangible personal property, it would have expressly so provided, as it did in the case of insurance by Section 403 (b) (3) of the Revenue Act of 1918, and as it did in the case of shares of stock of *domestic* corporations by Section 303 (d) of the Revenue Act of 1924.

These provisions with reference to insurance and shares of stock in domestic corporations indicate clearly that Congress intended the general rule (domicile of the owner) to apply to all other classes of intangible personal property.

(3) It is also provided in Section 303 (e) that "any moneys deposited with any person carrying on the banking business by or for a non-resident decedent who was not engaged in business in the United States at the time of his death shall *not* be deemed property within the United States."

It is argued from this provision that by expressly providing that the domicile of the debtor in such cases shall not be deemed the situs of the debt for purposes of taxation under the Act, Congress intended that as to all other debts the domicile of the debtor should be taken as the situs of the debt for the purpose of subjecting such other debts to taxation under the Act. There might be some force to such an argument if under the general

rule of situs a debt were situated at the domicile of the debtor, but the general rule, as already stated, is that the situs of a debt is at the domicile of the *creditor.* Therefore, the provision above quoted from Section 303 (e), instead of being an exception to the general rule, is merely an *express* application of the general rule to such bank deposits. It is well known that this provision, first inserted in the Revenue Act of 1921, was a response to expressed desires on the part of the banking interests to make this country a financial center by giving non-residents an *express* assurance that the maintenance of bank balances here would not involve a tax.

Furthermore, bank deposits are *sui generis.* While technically the relation between bank and depositor is merely that of *debtor and creditor,* the ownership of the moneys deposited being vested in the bank when deposited, this legal relationship has sometimes been ignored and the situation treated as if the depositor were the owner of moneys in the custody of the bank. In other words, a depositor is sometimes deemed to be the owner of the tangible property, i. e., the *specie* in the bank.

The provision above quoted from Section 303 (e) by providing that "moneys" deposited with any person carrying on the banking business by or for such non-resident decedent shall "not be deemed property" within the United States, in effect maintains the legal relationship between bank and depositor (that of debtor and creditor) in respect of such bank deposits. Under this section such bank deposits cannot legally be treated as tangible property belonging to the depositor.

The inclusion of these three provisions in the statute is consistent only with the theory that Congress intended that the rules of the common law should apply in all other respects in the determination of whether or not any item of property owned by a non-resident decedent is situated within the United States.

The petitioner argues that the purpose of Congress to reach the transfer of every kind of property within its power is evidenced by the existence at the time the statute was enacted of the decisions in *Eidman* vs. *Martinez*, 184 U. S., 578; *Wheeler* vs. *Sohmer*, 233 U. S., 434, and *De Ganay* vs. *Lederer*, 250 U. S., 376. In the Eidman case the Court failed to find in the inheritance tax law contained in the War Revenue Act of 1898, an intention to base a tax upon bonds of the non-resident alien, the physical evidences of which were in the possession of the alien's agent in the United States. The actual holding in the case was purely one of statutory construction and the dictum as to the power of the Legislature was absolutely unnecessary to the decision. This case recognizes the necessity of clear evidence of intent in the statute. The Wheeler cases recognizes the doctrine that for purposes of taxation the common law rule of situs applies *in the absence of a statutory enactment*, but stood for the proposition (now rejected) that a State could create an additional situs by statute. If Congress had had the Eidman and Wheeler cases in mind at the time of enacting the Revenue Act of 1924 and had intended to subject to tax intangibles such as those involved in the case at bar, it would certainly have realized the necessity of incorporating in the Act provisions clearly establishing such intent, and since such provisions are not found in the Act, the conclusion is irresistible that Congress could only have intended that the common law rule should apply. *De Ganay* vs. *Lederer* is not in point because it is an income tax case and deals with the income from property having a business situs in the United States.

The petitioner's argument that Congress in enacting the Revenue Act of 1924 impliedly adopted the regulations under prior and similar acts is not convincing. In so far as bonds are concerned the regulations adopted

a theory contrary to the common law rule (Article 53 of Treasury Regulations 63, Revenue Act of 1921). By their silence as to stock of foreign corporations they adopted the common law rule. There is certainly no warrant in the statutes preceding the 1924 Act for any such distinction. It is, therefore, impossible to place any reliance upon the theory of a legislative adoption. Further, that theory must be limited to regulations which are consistent with the statute and not such regulations as are clearly contrary to it.

Since the statute evidences affirmatively the intent of Congress *not* to subject to the tax intangibles of the classes here involved, it follows that there cannot be found in the statute any clear evidence of an intent by Congress to subject such intangibles to the tax and that, therefore, they are not reached by the statute.

> *Gould* vs. *Gould,* 245 U. S., 151, 153; 38 S. Ct., 53; 62 L. Ed., 211.

The petitioner concedes that the recent decisions of this Court in *Farmers Loan & Trust Company* vs. *Minnesota,* 280 U. S., 204; *Baldwin* vs. *Missouri,* 281 U. S., 581; *Beidler* vs. *South Carolina Tax Commission,* 282 U. S., 1; and *First National Bank of Boston* vs. *Maine,* 284 U. S., 312, have raised doubt as to the power of Congress to include in the gross estate intangibles of non-resident decedents. All that is novel in the decisions in the four cases last mentioned is that they repudiate the doctrine exemplified in *Blackstone* vs. *Miller,* 188 U. S., 189, that a State may by statute create a situs for intangibles other than or in addition to the domicile of the owner. All four of those recent cases in declaring that it is not competent for the States to establish by statute any situs for intangibles other than the domicile of the owner emphasize and reiterate the rule laid down in *State Tax on Foreign-Held Bonds,* supra, *Kirtland* vs.

Hotchkiss, supra, and *Buck* vs. *Beach,* 206 U. S., 392, 51 L. Ed., 1106, that the common law situs of intangibles is at the domicile of their owner. The doubt expressed by the petitioner as to the power of Congress to tax the intangibles here involved is a conviction with the respondents. This conviction is supported by the decisions of this Court, most of them of very recent date.

In *State Tax on Foreign-Held Bonds,* supra, the Supreme Court said:

> "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property and business. Whatever form taxation may assume, whether as duties, imposts, excises or licenses, it must relate to one of these subjects."

While the above decision related to power of a State to tax, the rule applies with equal force to the Federal Government. *Heiner* vs. *Donnan,* 76 L. Ed. (Adv. Sheets), 501. This decision declared unconstitutional a provision of the Revenue Act of 1926 purporting to establish a conclusive presumption that transfers made within two years prior to death shall be deemed to have been made in contemplation of death. In so doing, the Supreme Court followed *Schlesinger* vs. *Wisconsin,* 270 U. S., 230, which declared a similar provision in a State statute unconstitutional. The opinion in the Heiner case reads, at page 506:

> "Nor is it material that the 14th Amendment was involved in the Schlesinger Case, instead of the 5th Amendment, as here. The restraint imposed upon legislation by the due process clauses of the two amendments is the same. Coolidge vs. Long, 282 U. S., 582, 596, 75 L. Ed., 562, 566, 51 S. Ct., 306.

That a federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the due process of law clause of the 5th Amendment is settled. Nichols vs. Coolidge, 274 U. S., 531, 542, 71 L. Ed., 1184, 1192, 52 A. L. R., 1081, 47 S. Ct., 710; Brushaber vs. Union P. R. Co., 240 U. S., 1, 24, 25, 60 L. Ed., 493, 504, 36 S. Ct., 236; Tyler vs. United States, supra (281 U. S., p. 504, 74 L. Ed., 998, 69 A. L. R., 758, 50 S. Ct., 356)."

The record here stands undisputed that the decedent was not within the jurisdiction of the United States and that neither he nor his property was engaged or employed in business here. *Farmers Loan & Trust Company* vs. *Minnesota*, supra; *Baldwin* vs. *Missouri*, supra; *Beidler* vs. *South Carolina Tax Commission*, supra, and *First National Bank of Boston* vs. *Maine*, supra, have finally and definitely established that for purposes of taxation the exclusive situs of intangible personal property is the domicile of the owner. Under these decisions the intangibles here in question were not within the jurisdiction of the United States.

Their transmission upon the death of this non-resident alien is no more subject to the taxing power of the United States than is the transmission of his Cuban real property. The following language found at pages 326 and 327 of the *Maine* case (supra), although written with relation to the power of a State of the Union to tax the transfer of intangibles of a decedent not resident in that State, is of equal cogency when applied to the power of the United States to tax the transmission of intangibles belonging to a decedent who was neither a citizen nor a resident of the United States:

"It long has been settled law that real property cannot be taxed, or made the basis of an inheritance

tax, except by the state in which it is located. More recently it became settled that the same rule applies with respect to tangible personal property. And it now is established by the three cases last cited that certain specific kinds of intangibles, namely, bonds, notes and credits, are subject to the imposition of an inheritance tax only by the domiciliary state; and this notwithstanding the bonds are registered in another state, and the notes secured upon lands located in another state, resort to whose laws may be necessary to secure payment.

"The rule of immunity from taxation by more than one state, deducible from the decisions in respect of these various and distinct kinds of property, is broader than the applications thus far made of it. In its application to death taxes, the rule rests for its justification upon the fundamental conception that the transmission from the dead to the living of a particular thing, whether corporeal or incorporeal, is an event which cannot take place in two or more states at one and the same time.

"In respect of tangible property, the opposite view must be rejected as connoting a physical impossibility; in the case of intangible property, it must be rejected as involving an inherent and logical self contradiction. Due regard for the processes of correct thinking compels the conclusion that a determination fixing the local situs of a thing for the purpose of transferring it in one state carries with it an implicit denial that there is a local situs in another state for the purpose of transferring the same thing there. * * *

"A transfer from the dead to the living of any specific property is an event single in character and is effected under the laws, and occurs within the limits, of a particular state; * * *."

The cases of *United States* vs. *Bennett*, 232 U. S., 299 and *Cook* vs. *Tait*, 265 U. S., 47, upon which the petitioner relies to oppose the foregoing argument, both involve the power of the United States to tax its own citizens, and, therefore, neither of them is applicable to the situation here presented because the decedent was not a citizen of the United States.

WHEREFORE it is respectfully submitted that the petition should be denied.

November, 1932.

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No. 496.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

DAVID BURNET, Commissioner of Internal Revenue,
Petitioner,

vs.

ERNEST BROOKS, HAROLD WILSON BROOKS, and WALTER DOUGLAS BROOKS, as Executors of the Will of ERNEST AUGUSTUS BROOKS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENTS.

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IN THE

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OCTOBER TERM, 1932.

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DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

ERNEST BROOKS, HAROLD WILSON BROOKS and WALTER DOUGLAS BROOKS, as executors of the will of Ernest Augustus Brooks.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS.

Opinions Below.

The opinion of the United States Board of Tax Appeals (R., 12-22) is reported in 22 B. T. A., 71. The opinion of the Circuit Court of Appeals (R., 47-51) is reported in 60 F. (2d), 890.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered August 5, 1932 (R., 51). It affirmed a determination of the United States Board of Tax Appeals reducing to $1.79 a deficiency in estate tax claimed by the petitioner to be $24,865.88 (R., 5, 22, 51). The petition for certiorari was filed November 4, 1932, and granted December 5, 1932. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Involved.

The issues for the present consideration of the Court are:

(1) Whether or not the estate tax imposed by the Revenue Act of 1924 applies (a) to shares of stock in a foreign corporation and (b) to bonds of foreign corporations, bonds of foreign governments, bonds of domestic corporations and bonds of domestic municipalities, owned by a *non-resident alien decedent*, not engaged in business in the United States at the time of his death, where the paper evidences of such securities were located within the United States at the time of his death; and

(2) Whether or not the estate tax imposed by the Revenue Act of 1924 applies to a deposit by a *non-resident alien decedent*, not engaged in business in the United States at the time of his death, with the firm of Lawrence Turnure & Company, New York City.

The Statute.

The pertinent provisions of the Revenue Act of 1924, c. 234, 43 Stat., 253, are as follows:

"Sec. 301. (a) In lieu of the tax imposed by Title IV of the Revenue Act of 1921, a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 303) is hereby imposed upon the transfer of the net estate of every decedent dying after the enactment of this Act, whether a resident or non-resident of the United States:

(Here follow the rates.)

Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate;

* * * * * *

Sec. 303. For the purpose of the tax the value of the net estate shall be determined—

* * * * * *

(b) In the case of a non-resident, by deducting from the value of that part of his gross estate which at the time of his death is situated in the United States—

* * * * * *

(d) For the purpose of Part I of this title, stock in a domestic corporation owned and held by a

non-resident decedent shall be deemed property within the United States, * * *.

(e) The amount receivable as insurance upon the life of a non-resident decedent, and any moneys deposited with any person carrying on the banking business, by or for a non-resident decedent who was not engaged in business in the United States at the time of his death, shall not, for the purpose of Part I of this title, be deemed property within the United States."

Statement of Facts.

Respondents are the executors of the estate of Ernest Augustus Brooks, who died on October 31, 1924 (R., 8).

At the time of his death, Ernest Augustus Brooks was a resident of Cuba, and a subject of Great Britain. He was not engaged in business within the United States (R., 8).

The decedent's last will and testament was executed in Cuba and filed in accordance with the Cuban statutes with a Cuban notary public. The respondents were named as executors in that will, which contained a direction, permissible under Cuban law, that administration of the estate be carried on without judicial intervention (R., 38-40).* In order to secure the release of certain assets, probate proceedings were initiated in New York, in connection with which New York transfer tax proceedings were had (R., 42).*

At the time of his death, the decedent was the owner of shares of corporate stock and bonds as follows (R., 8; full list with values shown at R., 8, 9, 10 and 11):

*These facts are not included in the findings, but appear in the record at the pages cited.

Bonds of foreign corporations and accrued interest thereon of an aggregate value of	$24,384.97
Bonds of foreign governments and accrued interest thereon of an aggregate value of	55,610.49
Bonds of domestic corporations and accrued interest thereon of an aggregate value of	460,315.32
Bonds of a domestic municipality and accrued interest thereon of an aggregate value of	15,073.57
Stock in a foreign corporation of an aggregate value of	50,000.00
	$605,384.35

The paper evidences of part of the foregoing securities were in the possession of decedent's son, Ernest Brooks, in New York City. He collected the income therefrom and deposited the same in his father's bank account (R., 11).

The paper evidences of the remaining securities were in the possession of Lawrence Turnure & Company, in New York City. That firm collected the income therefrom and placed the same to decedent's credit subject to his check (R., 11).

None of these securities was pledged or held as security for any indebtedness (R., 11).

The 666 shares of capital stock of the Central Romelie S. A. Cuba Joint Stock Co. were shares of stock in a corporation, organized under the laws of Cuba (R., 11), operating a sugar business in Cuba (R., 35).*

The foregoing securities were all included by the petitioner in determining the value of that part of the

*This fact is not included in the findings, but appears in the record at the page cited.

gross estate of the decedent which at the time of his death was situated in the United States (R., 11).

At the time of his death, decedent had a drawing account with the firm of Lawrence Turnure & Company, New York City, in which that firm placed the income from the decedent's securities in its possession and against which the decedent from time to time had drawn checks (R., 11). Such checks were honored by Lawrence Turnure & Company (R., 38-39).* The balance of $14,517.98 on deposit at the date of death was included by the petitioner in determining the value of that part of the gross estate of the decedent which at the time of his death was situated in the United States (R., 11).

The Board of Tax Appeals held that none of the foregoing securities or the foregoing deposit was properly included in the gross estate (R., 11). Its decision has been affirmed by the Circuit Court of Appeals for the Second Circuit (R., 47-50). The majority of that Court based the affirmance upon their opinion (which was the view of the Board of Tax Appeals) that the statute does not reach the property involved (R., 50). Judge Learned Hand (concurring) relied more "upon the fact that if the Treasury be right" in its claims as to the construction of the statute, "the act is open to very grave constitutional doubts" (R., 51).

Specifications of Error.

The petitioner urges that the Circuit Court of Appeals erred—

1. In failing to hold that the stocks, bonds, and cash on deposit were property situated in the United States within the meaning of Section 303 (b) of the Revenue Act of 1924.

*This fact is not included in the findings, but appears in the record at the page cited.

2. In holding that the Revenue Act of 1924 did not require the inclusion in the gross estate of a non-resident decedent of the value of intangible property the physical evidences of which are actually present in the United States.

3. In affirming the decision of the Board of Tax Appeals (p. 4 of petition for Writ of Certiorari; p. 4, Petitioner's Brief).

Summary of Respondents' Argument.

The exclusive situs for estate tax purposes of intangible property owned by a non-resident alien decedent and consisting of government, corporate and municipal bonds, stock of a foreign corporation and a debt owed by a resident debtor, is at the domicile of the decedent, where, as here, none of such property has a "business situs" elsewhere.

The Revenue Act of 1924 does not attempt to change such situs.

A Federal statute which attempted to change such situs could not succeed in doing so, because it would be repugnant to the Fifth Amendment to the Constitution of the United States.

ARGUMENT.

I.

The Revenue Act of 1924 does not treat intangibles consisting of stock of a foreign corporation and bonds, the paper evidences of which are physically present in the United States, and of a debt due from a domestic debtor, as property situated in the United States.

The Revenue Act of 1924 imposes a tax "upon the *transfer* of the net estate of every decedent dying after

the enactment of this Act, whether a resident or non-resident of the United States" (Section 391 [a]).

The Act provides for the valuation of the gross estate of the decedent (Section 302) and provides that the net estate shall be determined by making certain deductions from the gross estate (Section 303). In the case of a non-resident decedent, the Act provides that the net estate shall be determined by making these deductions "from the value of that *part* of his gross estate which at the time of his death is *situated in the United States*" (Section 303[b]). (Italics ours.)

Congress has specifically provided in this Act (Section 303 [d]) that for purposes of taxation under the Act, shares of stock of *domestic* corporations owned by a non-resident decedent shall be deemed to be "situated in the United States." The Act contains no provision purporting to fix the situs of shares of stock of *foreign* corporations or bonds of any description owned by a non-resident decedent, or debts due him from domestic debtors.

The shares of corporate stock here involved were those of *a Cuban corporation doing business in Cuba* (R., 33, 11). The decedent was a *resident of Cuba* and a *subject of Great Britain.* The stock certificates representing such shares were in the United States at the date of his death. The petitioner included these shares in the gross estate as being property "situated in the United States" (R., 11).

The bonds here involved were the obligations of foreign corporations, foreign municipalities, domestic corporations and a domestic municipality. The paper evidences of these obligations were in the United States at the date of the decedent's death. The petitioner included these obligations in the gross estate as being property "situated in the United States" (R., 8-11).

The debt here involved was that of a domestic debtor. The petitioner included this debt in the gross estate as

being property "situated in the United States" (R., 8, 11).

The statute does not attempt to define the phrase "situated in the United States." The primary question, therefore, is what the Congress meant by that phrase.

In considering that question it will be found that other provisions of the statute are not only consistent with the construction of the statute for which we contend, but that they are consistent only with that construction; and also that the state of the law regarding the tax situs of intangibles as declared by this Court at the time of the passage of the Revenue Act of 1924 is compelling in favor of that construction.

As to the latter, the position taken in the petitioner's brief (pp. 8-10) discloses a misconception of what this Court had actually held prior to 1924. The fact is that this Court prior to that date had consistently recognized the common law doctrine of *mobilia sequuntur personam* as fixing the situs of intangible property at the domicile of the owner, but had conceded to taxing authorities the power (since denied them, except possibly where the intangibles have acquired a "business situs" elsewhere) of fixing an additional situs by express statutory provision.

Railroad Company vs. *Pennsylvania* (*State Tax on Foreign-Held Bonds*), 15 Wall., 300;
Kirtland vs. *Hotchkiss*, 100 U. S., 491;
New Orleans vs. *Stempel*, 175 U. S., 309;
Eidman vs. *Martinez*, 184 U. S., 578;
Blackstone vs. *Miller*, 188 U. S., 189;
Buck vs. *Beach*, 206 U. S., 392;
Wheeler vs. *Sohmer*, 233 U. S., 434.

In *Railroad Company* vs. *Pennsylvania* (supra), the opinion reads at page 320:

"But debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense; they are obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. To call debts property of the debtors, is simply to misuse terms. All the property there can be, in the nature of things, in debts of corporations, belongs to the creditors, to whom they are payable, and follows their domicil, wherever that may be. *Their debts can have no locality separate from the parties to whom they are due.* This principle might be stated in many different ways, and supported by citations from numerous adjudications, but no number of authorities and no forms of expression could add anything to its obvious truth, which is recognized upon its simple statement." (Italics ours.)

In *Kirtland* vs. *Hotchkiss* (supra), Connecticut imposed a tax on a debt owing to a resident of Connecticut by a resident of Illinois and secured by a mortgage on property situated in Illinois. This Court held that the tax was properly imposed because the debt was property in the hands of the creditor and was situated at the place of his domicile, namely, Connecticut.

In commenting on *Kirtland* vs. *Hotchkiss* (supra), this Court in *New Orleans* vs. *Stempel* (supra), stressed the necessity of a specific statutory provision in order to create a situs other than the domicile of the creditor in the following language at page 321:

"It was assumed that the situs of such intangible property as a debt evidenced by bond was at the domicil of the owner. *There was no legislation attempting to set aside that ordinary rule in respect to the matter of situs.*" (Italics ours.)

In *Eidman* vs. *Martinez* (supra), the question involved was whether the inheritance tax provisions of the War Revenue Act of 1898 reached federal, municipal and corporate bonds, the physical evidences of which were in the custody of a non-resident alien decedent's agent in New York. This Court construed the Act as not reaching any property passing under the will of a non-resident alien and thus was not under the necessity of passing upon the situs of the particular property in question. However, the opinion discusses at length the maxim *mobilia sequuntur personam*, and concludes:

> "Conceding it to be within the power of Congress to impose an inheritance tax upon property in this country, no matter where owned or transmitted, it has not done so in this case * * *."

DeGanay vs. *Lederer*, 250 U. S., 376, upon which the petitioner relies for support for his argument that the Congress must have intended to reach by the Statute intangibles of the character of those in the case at bar, does not, in fact, support his argument. That case does not reject the maxim *mobilia sequuntur personam*. In applying the *income tax provisions* of the 1913 Act this Court did, as petitioner points out, hold that the maxim did not apply to the situation there presented, but the petitioner has failed to point out the reason, which, as emphasized in the opinion of this Court, was that the property from which the income was derived had acquired a business situs in the United States because that property was a fund which had been invested and reinvested since 1885 in the United States by the owner's agent domiciled here. The distinction between this sort of situation and the situation in the case at bar is well illustrated in *Ewa Plantation Co.* vs. *Wilder*, 289 Fed., 664 and *Hill* vs. *Carter*, 47 Fed. (2d), 869, certiorari denied 284 U. S., 625. These two cases plainly demon-

strate that the intangibles in the case at bar had no business situs in the United States. In each of them Hawaii was seeking to tax the income of its resident from property owned in Hawaii. In the latter of them the facts were as in the *DeGanay* case and the decision was that *mobilia sequuntur personam* therefore did not apply, the property was not in Hawaii and the income from it was not taxable. In the former the facts were as in the case at bar and the decision was that *mobilia sequuntur personam* did apply, the property was in Hawaii and the income from it was taxable.

The petitioner cites *Kepner* vs. *United States*, 195 U. S., 100, 124, for the proposition that it is a well settled rule of construction that language used in a statute which has a settled and well known meaning, sanctioned by judicial decision, is presumed to be used in that sense by the legislative body. He argues therefrom that a tax imposed upon the transfer of the property "situated in the United States" must be deemed to have been imposed upon intangibles, which under the decisions of the Court had a situs here for the purposes of taxation. His argument loses all force when it is considered that what this Court had held prior to 1924 was not that intangibles had a general situs for taxation where the evidences thereof were found, *but that they might be given such a situs by a statute so providing.*

We, therefore, repeat that at the time of the passage of the Revenue Act of 1924, the law was plainly laid down that the taxable situs of intangible personal property was normally at the domicile of the owner regardless of the place where the paper evidences of such property might be and that the then admitted power of taxing authorities to create an additional situs must be exercised by a statute clearly evidencing such intent, for in every case in which an additional situs was allowed this Court found in the taxing statute itself affirmative evidence of an intent to fix such additional situs or found

itself bound by the decision of the State Court that such intent existed.

In this state of the declared law it is very clear that if the Congress had intended to attempt to fix a situs for intangibles for purposes of the estate tax provisions of the Revenue Act of 1924 at the place where the physical evidences of the intangible property were found, it would have recognized the necessity of plainly so declaring. It did not do so. Instead, what do we find?

(1) We find no definition in the Act of the phrase "situated in the United States."

(2) We find it provided in Section 303 (d) that stock in a domestic corporation *shall* be deemed property within the United States. No similar provision is made as to stock in foreign corporations or bonds. The express inclusion of the one class of property obviously implies the exclusion of the others. *Expressio unius est exclusio alterius.* The petitioner argues that by the provision last referred to Congress intended to add to all intangibles, paper evidences of which are within the United States, the stock of domestic corporations, irrespective of the location of the certificates of stock. This argument provokes the comment that if this were indeed the Congressional intent the language used is singularly inappropriate for the purpose. On petitioner's theory stock in a domestic corporation is "situated in the United States" if the stock certificates are here. If this be so, then what Congress would have done in order to bring all stock in domestic corporations within the statute would have been to insert a provision that stock in domestic corporations shall be deemed property within the United States in cases where the stock certificates are located elsewhere.

(3) We find it provided in Section 303 (e) that the amount receivable as insurance upon the life of a non-

resident decedent shall *not* be deemed property within the United States.

It is argued by the petitioner (pp. 13-14 of his brief) that the express exclusion of the proceeds of life insurance policies (a type of intangible personal property) even though the debtors or the insurance policies might be in the United States, implies that other intangibles similarly situated and not so excepted shall be deemed to be property situated within the United States. Exactly the contrary conclusion must be reached when consideration is given to the history of this provision.

This provision was first introduced in the Revenue Act of 1921 as Section 403 (b) (3) of that Act, to *repeal* the following provision contained in Section 403 (b) (3) of the Revenue Act of 1918:

> "* * * the amount receivable as insurance upon the life of a non-resident decedent where the insurer is a domestic corporation, shall be deemed property within the United States. * * *"

The purpose of this repealer is made plain by the report of the Committee on Finance (Report No. 275, 67th Congress, First Session), with respect to the Revenue Act of 1921, which contains the following statement on page 25:

> "Section 403 (b) (3). Under existing law the proceeds of insurance upon the life of a non-resident decedent, where the insurer is a domestic company, is deemed property within the United States. This has been found to place American insurance companies at a disadvantage in competing with foreign companies, and, in order to remedy this situation, the proposed bill expressly states that such insurance shall not be regarded as property situated in the United States."

In the light of this history of Section 303 (e) of the Revenue Act of 1924, it is evident that Congress, when enacting that provision, regarded a tax upon insurance upon the life of a non-resident decedent as an *exception* to the general rule; otherwise, it would not have enacted the provision above quoted from the Revenue Act of 1918. In singling out such insurance and imposing a tax thereon, Congress implied the intention to exclude from taxation all other intangible personal property belonging to non-resident decedents, whether or not the debtor or the evidence of the debt was in the United States. If Congress had intended to include and attempt to subject to taxation such other intangible personal property, it would have expressly so provided, as it did in the case of insurance by Section 403 (b) (3) of the Revenue Act of 1918, and as it did in the case of shares of stock of *domestic* corporations by Section 303 (d) of the Revenue Act of 1924.

These provisions with reference to insurance and shares of stock in domestic corporations indicate clearly that the Congress intended the general rule (domicile of the owner) to apply to all classes of intangible personal property not specifically dealt with in the statute.

(4) We find it also provided in Section 303 (e) that any moneys deposited with any person carrying on the banking business, by or for a non-resident decedent who was not engaged in business in the United States at the time of his death, shall *not* be deemed property within the United States.

Here again it is argued by the petitioner (pp. 13-14 of his brief) that the express exclusion of such moneys (a type of intangible personal property), even though the debtors or the physical evidences of the debts might be in the United States, implies that other intangibles similarly situated and not so excepted shall be deemed

to be property within the United States. Here again exactly the contrary conclusion must be reached. The effect of the petitioner's argument is that the Congress by expressly providing that the domicile of the debtor in such cases shall not be deemed the situs of the debt for purposes of taxation under the Act, intended that as to all other debts the domicile of the debtor should be taken as the situs of the debt for the purpose of subjecting such other debts to taxation under the Act. There might be some force to such an argument if under the general rule of situs a debt were situated at the domicile of the debtor, but the general rule, as already stated, is that the situs of a debt is at the domicile of the *creditor*. Therefore, the provision above quoted from Section 303 (e), instead of being an exception to the general rule, is merely an *express* application of the general rule to such bank deposits. It is well known that this provision, first inserted in the Revenue Act of 1921, was a response to expressed desires on the part of the banking interests of the country to make it the financial center of the world by giving non-residents an *express* assurance that the maintenance of bank balances here would not involve a tax.

Furthermore, there is ground for the belief that the Congress thought of such moneys as tangible rather than intangible property. While technically the relation between bank and depositor is merely that of *debtor and creditor*, the ownership of the moneys deposited being vested in the bank when deposited, this legal relationship has sometimes been ignored and the situation treated as if the depositor were the owner of moneys in the custody of the bank. In other words, a depositor is sometimes deemed to be the owner of the tangible property, i. e., the *specie* in the bank. (See *New Orleans* vs. *Stempel*, supra, at p. 316; *Blackstone* vs. *Miller*, supra, at p. 205.)

The provision above quoted from Section 303 (e) by providing that "moneys" deposited with any person carrying on the banking business by or for such non-resident decedent shall "not be deemed property" within the United States, in effect maintains the legal relationship between bank and depositor (that of debtor and creditor) in respect of such bank deposits. Under this provision such bank deposits cannot legally be treated as tangible property belonging to the depositor.

The inclusion in the statute of the three provisions just discussed compels the conclusion that the Congress intended that the rules of the common law should apply in all other respects in the determination of whether or not any item of property owned by a non-resident decedent is situated within the United States.

It may be noted that all the cases which have passed upon the construction of the statute are in harmony with the views hereinabove expressed.

Estate of Garvan vs. *Commissioner,* 25 B. T. A., 612;
Shenton vs. *United States,* 53 Fed. (2nd), 249;
Sanchez vs. *Bowers,* 57 Fed. (2nd), 324.

In *Shenton* vs. *United States* (supra), the District Court for the Southern District of New York passed upon the precise question herein involved. The Court held that intangible property represented by warrants, located in the United States, for stock of a foreign corporation was not subject to tax when owned by a non-resident decedent. At page 250, the opinion reads:

> "In construing the statute it should be recognized that there is no express provision to the effect that stock is to be included in computing the tax merely because the certificate for it is situated within the

United States; and on the other hand there is the express clause that stock owned by a non-resident decedent is to be included, provided it is stock of a domestic corporation. The general rule is that the legal situs of personal property including stock is the domicile of the owner, though frequently tax statutes contain express provisions, such as the above mentioned clause, making the situs of stock the place of incorporation of the company issuing it. If it is intended to constitute the place where the certificate of stock physically exists as the taxable situs of the stock, that intention should clearly appear because it is contrary to the general current of thought and because, furtner, tax statutes should be strictly construed against the Government. The statute in question does not disclose such clear intention to include stock merely on the ground that its certificate is physically located in this country; but, on the contrary, there appears an affirmative intention to limit the tax to such stock as was owned by a resident decedent or issued by a domestic corporation. This was specifically held by the Board of Tax Appeals in Brooks vs. Commissioner, 22 B. T. A., page 71."

The petitioner in his brief (pp. 11-13, 15-16) stresses the argument that the construction placed by the related regulations upon language in prior and similar Revenue Acts, which is similar to the language found in the Revenue Act of 1924, shows an implied adoption by the Congress in the latter Act of the regulations issued under prior Acts. The Court below rightly dismissed petitioner's argument (R., 49). The petitioner goes too far in citing *National Lead Company* vs. *United States,* 252 U. S., 140, 146 and *Brewster* vs. *Gage,* 280 U. S., 327, 337, for the proposition that the regulations upon which he relies

have the force of law and are not to be disregarded without cogent reasons. The most that these two authorities can be said to hold is that regulations which are reasonable and do no violence to the letter or spirit of a statutory provision or which construe an ambiguous or doubtful statute, may sometimes be held to find legislative approval in the subsequent reenactment of such statute. However far the theory of legislative adoption of such regulations may have gone, it has not gone and cannot go to the length of permitting legislation by regulations which are contrary to the proper and natural construction of the related statute or which contravene the familiar rule that tax statutes should be construed strictly against the taxing authority and liberally in favor of the taxpayer.

Eidman vs. *Martinez,* 184 U. S., 578, 583;
Gould vs. *Gould,* 245 U. S., 151.

The petitioner's argument with respect to the regulations is fallacious—on the one hand the argument is made that bonds of a non-resident are property in the United States because the regulations under prior Acts say so, although the 1924 Act does not, and on the other hand it is argued that stock of a foreign corporation owned by a non-resident is property within the United States—although not declared to be such either by prior regulations or the 1924 Act—because the prior regulations must not be deemed to limit the estate tax to the class of intangibles therein mentioned. It is respectfully submitted that this Court will not sanction the exaction of taxes upon any such doubtful evidence of Congressional intent. The fact is that in so far as bonds are concerned the prior regulations proceeded upon a theory contrary to the common law rule (Article 53, Regulations 63, Revenue Act of 1921), while by their silence as to stock of foreign corporations they adopted the common law rule.

There is certainly no warrant in the statutes preceding the 1924 Act for any such distinction. It is, therefore, impossible to place any reliance upon the theory of a legislative adoption of the prior regulations by the 1924 Act (see *Shenton* vs. *United States,* supra, at pp. 250-251).

Moreover, an examination of the income tax provisions of the Revenue Act of 1924 and of its predecessor, the Revenue Act of 1921, furnishes convincing proof that the Congress did not intend to adopt the earlier regulations relating to the estate tax sections of those Acts. In Section 217 of the Revenue Act of 1924 and in Section 217 of the Revenue Act of 1921 elaborate and detailed definition is made of what is and what is not income of a non-resident alien from sources within the United States. These provisions are much more detailed and involved than the estate tax sections of the 1924 Act and the related regulations combined. It is obvious that when the Congress went to such pains to define the income of a non-resident alien in the 1924 Act, it would have done the same with the estate tax provisions by at least incorporating in them the regulations under prior Acts if it wanted to adopt such regulations. There might be some ground for argument of the adoption of regulations in this case if the Congress in the estate tax sections of the 1924 Act had merely declared a tax upon the transfer of property "situated in the United States." But when the Congress went on to qualify that phrase by the provisions of Section 303 (d) and (e) above discussed, it must be concluded that the Congress inserted in the statute itself such definition and qualification of the phrase as it intended to make and its omission under such circumstances to carry the provisions of prior regulations into the statute itself negatives their implied adoption.

Finally, while we do not for the reasons heretofore given regard the statute as ambiguous, if it should be

so regarded, the construction of it adopted by the Court below should be affirmed as not raising any constitutional question. (*Brewster* vs. *Gage*, supra, at p. 335.)

It follows from the considerations above advanced that the Court below was right in deciding that the Revenue Act of 1924 does not reach the property here involved for purposes of the imposition of an estate tax upon its transfer.

II.

The Revenue Act of 1924 if given the construction for which the petitioner contends would be repugnant to the Fifth Amendment to the Constitution of the United States.

If, as we submit has been clearly shown, the Revenue Act of 1924 does not attempt to subject the transfer of the decedent's bonds, stock and moneys on deposit to the estate tax, the petitioner's arguments in support of the power of the Congress to do so do not require an answer. But if it should be held that such was the intent of the Congress, it is readily demonstrable by an unbroken line of decisions of this Court that it was ineffective because in violation of the due process clause of the Fifth Amendment.

In *State Tax on Foreign-Held Bonds* (supra), this Court said:

> "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property and business. Whatever form taxation may assume, whether as duties, imposts, excises or licenses, it must relate to one of these subjects."

While the foregoing quotation deals with the power of a State to tax, the rule applies with equal force to the power of the Federal Government.

Heiner vs. *Donnan*, 285 U. S., 312.

This decision declared unconstitutional as in violation of the Fifth Amendment a provision of the Revenue Act of 1926 purporting to establish a conclusive presumption that transfers made within two years prior to death shall be deemed to have been made in contemplation of death. In so doing, this Court followed *Schlesinger* vs. *Wisconsin*, 270 U. S., 230, which declared a similar provision in a State statute unconstitutional. The opinion in the *Heiner* case reads, at page 326:

> "Nor is it material that the 14th Amendment was involved in the Schlesinger Case, instead of the 5th Amendment, as here. The restraint imposed upon legislation by the due process clauses of the two amendments is the same. Coolidge vs. Long, 282 U. S., 582, 596, 75 L. ed., 562, 566, 51 S. Ct., 306. That a federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the due process of law clause of the 5th Amendment is settled. Nichols vs. Coolidge, 274 U. S., 531, 542, 71 L. ed., 1184, 1192, 52 A. L. R., 1081, 47 S. Ct., 710; Brushaber vs. Union P. R. Co., 240 U. S., 1, 24, 25, 60 L. ed., 493, 36 S. Ct., 236, Tyler vs. United States, supra (281 U. S., p. 504, 74 L. ed., 998, 69 A. L. R., 758, 50 S. Ct., 356)."

And the protection of the provisions of the Fifth Amendment extends to the alien friend.

Russian Volunteer Fleet vs. *United States*, 282 U. S., 481, 489.

Since the respondents' decedent was a non-resident alien, the United States did not have that power over him and his property which the relations of citizenship and domicile, or of either of them, might have given, and the United States could therefore tax the transfer of only such of his property as had a situs within its jurisdiction.

The record here stands undisputed that the respondents' decedent was not within the jurisdiction of the United States and that neither he nor his property was engaged or employed in business here (R., 8, 11). Under these circumstances his intangibles were not within the jurisdiction of the United States.

Whatever doubts may have existed prior to 1930 as to the situs of such intangibles for purposes of taxation have been resolved by the recent decisions of this Court and it is now firmly established that as to such intangibles the maxim *mobilia sequuntur personam* applies and their *only* situs for taxation is the domicile of their owner, except possibly in the case where they have become integral parts of a business localized in another jurisdiction.

Farmers Loan & Trust Co. vs. *Minnesota,* 280 U. S., 204;
Baldwin vs. *Missouri,* 281 U. S., 586;
Beidler vs. *South Carolina Tax Commission,* 282 U. S., 1;
First National Bank of Boston vs. *Maine,* 284 U. S., 312.

These cases determine effectively and completely in respondents' favor the constitutional question now under discussion because, although they deal with the power of the States to tax, they are made clearly applicable to the power of the United States to tax by the decision of this Court in *Heiner* vs. *Donnan* (supra).

In *Farmers Loan & Trust Company* vs. *Minnesota* (supra), it was held (citing *Blodgett* vs. *Silberman*, 277 U. S., 1) that bonds are to be treated as ordinary choses in action and that the attempted imposition by Minnesota of an inheritance tax in respect of bonds of Minnesota and of the cities of Minneapolis and St. Paul owned by a resident of New York was violative of the Fourteenth Amendment. *Blackstone* vs. *Miller*, 188 U. S., 189, which stood for a contrary doctrine was definitely overruled as no longer a correct exposition of existing law.

In *Baldwin* vs. *Missouri* (supra), the attempted imposition by Missouri of an inheritance tax in respect of deposits in Missouri banks and United States bonds and promissory notes, most of which were made by Missouri citizens and secured by liens on lands in Missouri and all owned by a resident of Illinois, was likewise held violative of the Fourteenth Amendment, *although the bonds and notes were physically within Missouri.*

Stocks and bonds are both intangible property and no distinction can be made between them for purposes of death duty taxation (*First National Bank* vs. *Maine*, supra, at pages 327-328). Therefore, the *Missouri* and *Maine* cases alone furnish all the authority necessary to support our contention that the Congress cannot tax the transmission of the bonds, stock and moneys on deposit owned by respondents' decedent.

In *Beidler* vs. *South Carolina* (supra), the attempted imposition by South Carolina of an inheritance tax in respect of a debt due by a South Carolina corporation to a resident of Illinois was likewise held violative of the Fourteenth Amendment.

Finally in *First National Bank* vs. *Maine* (supra), the attempted imposition by Maine of an inheritance tax in respect of stock of a Maine corporation owned by a resident of Massachusetts was likewise held violative of the Fourteenth Amendment.

The *ratio decidendi* of all four of these cases, although they deal with the power of the States to tax the transfer of intangibles of non-resident decedents, applies with equal cogency to the power of the United States to tax the transmission of intangibles belonging to a decedent who was neither a citizen nor a resident of the United States. It is thus expressed in the *Maine* case (supra) at pages 326 and 327:

> "It long has been settled law that real property cannot be taxed, or made the basis of an inheritance tax, except by the state in which it is located. More recently, it became settled that the same rule applies with respect to tangible personal property. And it now is established by the three cases last cited" (i. e., the *Minnesota, Missouri* and *South Carolina* cases) "that certain specific kinds of intangibles, namely, bonds, notes and credits, are subject to the imposition of an inheritance tax only by the domiciliary state; and this notwithstanding the bonds are registered in another state, and the notes secured upon lands located in another state, resort to whose laws may be necessary to secure payment.
>
> "The rule of immunity from taxation by more than one state, deducible from the decisions in respect of these various and distinct kinds of property, is broader than the applications thus far made of it. In its application to death taxes, the rule rests for its justification upon the fundamental conception that the transmission from the dead to the living of a particular thing, whether corporeal or incorporeal, is an event which cannot take place in two or more states at one and the same time.
>
> "In respect of tangible property, the opposite view must be rejected as connoting a physical impossibility; in the case of intangible property, it must be rejected as involving an inherent and logi-

> cal self contradiction. Due regard for the processes of correct thinking compels the conclusion that a determination fixing the local situs of a thing for the purpose of transferring it in one state carries with it an implicit denial that there is a local situs in another state for the purpose of transferring the same thing there. * * *
>
> "A transfer from the dead to the living of any specific property is an event single in character and is effected under the laws, and occurs within the limits, of a particular state; * * *."

The possibility that intangibles might be so employed in a taxing jurisdiction other than that of their owner as to acquire a "business situs" and be subject to taxation there has been already referred to. This Court has so held in dealing with a Virginia personal property tax statute (*Safe Deposit & Trust Company* vs. *Virginia*, 280 U. S., 83) and with the Federal income tax statute (*DeGanay* vs. *Lederer*, 250 U. S., 376) as well as in certain earlier cases.*

And in the *Maine* case (supra) it is written at page 331:

> "We do not overlook the possibility that shares of stock, as well as other intangibles, may be so used in a state other than that of the owner's domicile as to give them a situs analogous to the actual situs of tangible personal property. See Farmers Loan &

*It should be noted, however, that in the *Virginia* case the physical evidences of the intangibles involved were outside of Virginia in the possession of a Trustee domiciled in Maryland, who had the legal title. The actual point decided was that Virginia could not reach them to impose a personal property tax based on the domicile in Virginia of the *cestuis* of the trust and the application of the maxim *mobilia sequuntur personam*. The decision might well have been based solely--as it was in part—upon the distinction between legal and equitable ownership and the application of the maxim to the former only without regard to the location of the physical evidences of the intangibles.

T. Co. case, supra (280 U. S., 213, 74 L. Ed., 375, 65 A. L. R., 1000, 50 S. Ct., 98). That question heretofore has been reserved, and it still is reserved to be disposed of when, if ever, it properly shall be presented for our consideration."

The petitioner advances the argument at pages 27 to 29 of his brief that the intangibles involved in the case at bar had acquired a "business situs" in the United States. The Board of Tax Appeals made no such finding and the petitioner did not in the Court below (R., 26-27) and does not in this Court (Petition for Writ, p. 4; Petitioner's Brief, p. 4) specifically assign the failure to make such finding as error. It is, therefore, submitted that the question is not raised by the petitioner's specifications of error. But if the question were here, the petitioner's argument has no merit.

It is beyond dispute that the decedent was *not* at the time of his death engaged in business in the United States (R., 8). The physical evidences of his intangibles were in the possession of his son and of Lawrence Tunure & Company for the purpose of collecting the income and depositing it to decedent's credit (R., 11) and for no other purpose. On this state of facts *Baldwin* vs. *Missouri* (supra) is express authority that the decedent's intangibles had no "business situs" in the United States.

Such cases in this Court and elsewhere as support the "business situs" theory as applied to the use of intangibles have never gone beyond the point of finding a "business situs" to exist when a non-resident, through an agent, has employed his assets in a jurisdiction other than that of his domicile for purposes of trade or of investment and reinvestment (e. g., *Bristol* vs. *Washington County*, 177 U. S., 132; *Metropolitan Life Ins. Co.* vs. *New Orleans*, 205 U. S., 395). The petitioner is mistaken when he writes at page 29 of his brief that there was no such element in *New Orleans* vs. *Stempel* (175

U. S., 309). An examination of the opinion (p. 316) shows the contrary, as was noted by Mr. Justice McKenna in his concurring opinion in *Wheeler* vs. *Sohmer* (233 U. S., 434, 441-442).

The decision in *DeGanay* vs. *Lederer* (250 U. S., 376), referred to by petitioner at page 28 of his brief, is not inconsistent with what is written above. In that case a citizen and resident of France had in 1885 placed in the hands of her agent domiciled in Pennsylvania property which the agent, acting under power of attorney, had invested and reinvested down to 1913 in mortgages upon Pennsylvania lands, and stocks and bonds of corporations organized under the laws of the United States. The agent held the physical evidences of the property. The question presented as stated in the opinion was whether income from this property was income derived from property owned in the United States within the meaning of the Revenue Act of 1913. This Court held that it was, basing its decision largely on *Blackstone* vs. *Miller* (188 U. S., 189) and kindred cases and referring to four elements as completely localizing in the United States the property from which the income was derived: (1) the fact that the stocks and bonds were those of corporations organized under the laws of the United States, (2) the fact that the mortgages were secured upon Pennsylvania property, (3) the fact that the certificates of stock, and physical bonds and mortgages were in Pennsylvania, and (4) the power of investment and reinvestment of the agent. This decision might well have been based solely upon element (4) as evidencing that the nonresident's fund was employed in business in the United States. It must find its support there or in the provision of the 1913 Act taxing the income of every business carried on in the United States by persons residing elsewhere if it is to be regarded as any longer a correct decision under the law as laid down by this Court since

January, 1930. Elements (1), (2) and (3) are no longer admissible considerations since the decisions of this Court in the *Minnesota, Missouri, South Carolina* and *Maine* cases (supra). It is only upon the theory just expressed that the conclusion can be avoided that the *DeGanay* case is one of the "approving opinions" which fell when this Court in *Farmers Loan & Trust Co.* vs. *Minnesota* (supra), overruled *Blackstone* vs. *Miller* (supra). See *First National Bank* vs. *Maine* (supra), at page 324. This point of view is, we think, recognized in *Hill* vs. *Carter* (supra), in which the Circuit Court of Appeals for the Ninth Circuit expressed the view that *DeGanay* vs. *Lederer* (supra), has not been overruled.

The other arguments advanced by the petitioner in support of the constitutionality of the statute are also readily answered.

It is hardly fair to imply, as petitioner does at page 17 of his brief, that the sole motive which actuated this Court in deciding in the *Minnesota* and kindred cases that intangibles are subject to death duties only at the decedent's domicile* was to avoid multiple taxation by the States and secure parity between tangibles and intangibles. Undoubtedly that is a consideration which appeals strongly to the Court. But the decisions which we find controlling upon the case at bar rest upon a far broader base. That base is "the fundamental conception that the transmission from the dead to the living of a particular thing, whether corporeal or incorporeal, is an event which can not take place in two or more states at one and the same time" (*First National Bank* vs. *Maine* [supra], at p. 326). Since "due regard for the processes of correct thinking compels the conclusion that a determination fixing the local situs of a thing for the purpose of transferring it in one state

*With the possibility of a "business situs" left open.

carries with it an implicit denial that there is a local situs in another state for the purpose of transferring the same thing there" (ibid., pages 326-327) and since in a case arising from an attempt by New York to tax the transmission of this decedent's stock, bonds and moneys on deposit, this Court would hold that their transmission did not occur in New York (vide the *Missouri* case, supra), but did take place in Cuba, it is inconceivable that in the case at bar the Court could hold the contrary. The maxim *mobilia sequuntur personam* may not be one of invariable application, but to suggest that it may be applied to a State statute and not applied to a parallel Federal statute which seeks to reach the same transfer of the same property is to suggest an inconsistency which, we submit, this Court will not countenance.

We do not object to this tax—as the petitioner seems to think (p. 22 of his brief)—upon the ground that it involves taxation both by a State and the Federal Government. We insist that neither jurisdiction can impose the tax. Nor do we make a point of international double taxation, although it were well avoided. It may be that Great Britain might tax the transmission of the decedent's intangible property upon the ground of his citizenship and Cuba might tax it—as it could his Cuban real estate—upon the ground of his domicile and its consequent presence there. What we do insist is that the United States cannot impose the tax because, under the controlling decisions of this Court, the decedent's intangible property has no more situs for taxation here than has his Cuban real estate.

We dispute the statement made at pages 23 and 24 of petitioner's brief, if by it he intends to assert that the Fifth Amendment does not restrain the taxing power of the Federal Government to the same extent that the taxing power of the States is restrained by the Four-

teenth Amendment. *Heiner* vs. *Donnan* (supra), holds the restraint imposed by the due process clauses of the two Amendments is the same. The petitioner cites *United States* vs. *Bennett* (232 U. S., 299) and *Cook* vs. *Tait* (265 U. S., 47), as supporting his contention.

The opinion in the first of these cases cannot be read in its entirety without an instant realization of the fact that the situs of property had nothing to do with the decision, the salient feature of which was that a *citizen* of the United States, domiciled here, might be taxed in respect of a foreign-built yacht, even though the yacht had not been within the territorial jurisdiction of the United States during the period covered by the tax. That the basis of the power to tax was *the citizenship of the taxpayer* is made doubly clear by *United States* vs. *Goelet* (232 U. S., 293), decided at the same time, in which the facts were identical except that the citizen was permanently domiciled abroad, and in which this Court held that the taxing statute should not be construed to apply, although "not in the slightest degree questioning that there was power to impose the excise duty on the citizen owning a foreign-built yacht wholly irrespective of the fact that he was permanently domiciled in a foreign country."

Cook vs. *Tait* (supra), likewise stands for the proposition that a non-resident *citizen* may be taxed in respect of his income derived from property having its situs abroad, this Court stating the reason at page 56:

> "In other words, the principle was declared that the government, by its very nature, benefits the citizen and his property, wherever found, and therefore has the power to make the benefit complete. Or, to express it another way, the basis of the power to tax was not and cannot be made dependent upon the situs of the property in all cases, it being in or

> out of the United States, nor was not and cannot be made dependent upon the domicil of the citizen, that being in or out of the United States, but upon his relation as citizen to the United States, and the relation of the latter to him as citizen. The consequence of the relations is that the native citizen who is taxed may have domicil, and the property from which his income is derived may have situs, in a foreign country, and the tax be legal,—the government having power to impose the tax."

These three last cited cases have no application to the case at bar both because of the fact that the decedent here was a non-resident alien and because of the legal principle that situs within the taxing jurisdiction is necessary to the imposition of a tax upon the transmission of property at death (*Frick* vs. *Pennsylvania,* 268 U. S., 473).

Obviously in the present state of civilization and under our form of government the tax sought by the Treasury in this case cannot be exacted merely because the government has the physical power to collect it, as the petitioner suggests at page 26 of his brief. Might does not make right in this country. If such an exaction were possible the States in the *Minnesota, Missouri, South Carolina* and *Maine* cases (supra) would have proceeded to enforce their assessments. But as to the States the Fourteenth Amendment stands in the way. And as to the Federal government the Fifth Amendment is just as effective a bar. It would be begging the question to say that a distinction exists because the United States might coerce the States while there is no one to coerce the United States.

Petitioner's *quid pro quo* argument (Petitioner's Brief, pages 26-27)—his contention that protection furnished by the United States to the physical evidences of the decedent's intangible property requires and justi-

fies the exaction of a tax upon its transmission is baseless for at least two reasons. In the first place, the tax is not a tax levied in exchange for protection of property but solely upon the privilege of transmission of property. That privilege in the case at bar was not granted by the United States or any State of the Union. In the second place, whatever protection was afforded the property was furnished not alone by the United States, but to an equal or greater degree by the State of New York. Yet New York cannot tax its transmission (*Baldwin* vs. *Missouri,* supra) on that account. Since New York cannot, neither can the United States.

Whether or not other countries do not, as asserted at page 27 of petitioner's brief, permit the maxim *mobilia sequuntur personam* to be invoked in favor of non-residents is entirely immaterial. This is clear from what this Court recently wrote in *Russian Volunteer Fleet* vs. *United States* (supra), at pages 491-492, in referring to another clause of the Fifth Amendment.

> "As alien friends are embraced within the terms of the 5th Amendment, it cannot be said that their property is subject to confiscation here because the property of our citizens may be confiscated in the alien's country. The provision that private property shall not be taken for public use without just compensation establishes a standard for our government which the Constitution does not make dependent upon the standards of other governments."

These considerations demonstrate conclusively that the Revenue Act of 1924 cannot be construed as the petitioner would have it construed, without contravening the due process clause of the Fifth Amendment.

CONCLUSION.

The decision of the Circuit Court of Appeals is correct and should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1932.

No. 496.

DAVID BURNET, Commissioner of Internal Revenue,
Petitioner,

against

ERNEST BROOKS, HAROLD WILSON BROOKS, and WALTER DOUGLAS BROOKS, as Executors of the Will of ERNEST AUGUSTUS BROOKS.

BRIEF BY SELDEN BACON AS *AMICUS CURIAE.*

SELDEN BACON,
Amicus Curiae.

THE BALLOU PRESS NEW YORK

IN THE

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OCTOBER TERM, 1932.

No. 496.

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BRIEF BY SELDEN BACON AS *AMICUS CURIAE*.

If the Statute Were to Be Construed as Claimed by the Government, Enforcement of the Provisions for Taxing Bonds Belonging to a Friendly Alien Non-Resident Decedent, Merely Because the Bonds Were an Obligation of a Domestic Corporation and Physically Present Here, Would Be Unconstitutional.

As pointed out by Judge Learned Hand in his concurring opinion, it does not seem possible to distinguish the following recent decisions of this Court on the limits of governmental jurisdiction, for purposes of taxation, of sovereign States of this Union.

Farmers Loan & Trust Co. v. *Minnesota*, 280 U. S. 204;
Baldwin v. *Missouri*, 281 U. S. 586;
Buck v. *Beach*, 206 U. S. 392;
Blodgett v. *Silbermann*, 277 U. S. 1.

The sovereign *jurisdiction* of an American State to impose taxes within the scope of its territorial jurisdiction is, except as limited by the Federal Constitution, no more limited than that of any other sovereignty.

The *power* of an American State to exercise that jurisdiction has been directly limited, however, by two provisions of the United States Constitution.

> "No State shall, without the consent of Congress, lay "any Imposts or Duties on Exports or Imports."
>
> "No State shall, without the consent of Congress, lay "any duty of tonnage."
>
> Const. Art. I, Sec. 10.

And impliedly, under the Constitution, a State Government can no more tax the exercise of the sovereign functions of the Federal Government than the Federal Government can tax the exercise by the State Government of its functions.

> *The Collector* v. *Day*, 11 Wall. 113, 126-128;
> *Dobbins* v. *Erie County*, 16 Pet. 435.

None of these restrictions has the slightest application to an inheritance or estate tax, by whatever name it be called.

The estate or transfer tax, although in strictness a tax on the transfer, is, in its essence, analogous to a tax on property, as distinguished from a tax on persons or on business.

> "The principle that the subject to be taxed must be "within the jurisdiction of the State applies as well in "the case of a transfer tax as in that of a property tax."
>
> *Rhode Island Trust Co.* v. *Doughton*, 270 U. S. 69, 80.

No one of the restrictions above-mentioned was in any way made the basis of the decisions of this Court in the first four cases cited above. Each of them proceeded on the limitations of jurisdiction for purposes of taxation common to all sov-

ereign powers, or at most on the restrictions contained in the next to the last clause of Section 1 of the XIV Amendment.

But the States are no more limited in their powers of taxation by the next to the last clause of Section 1 of the XIV Amendment than is the United States by the identical words used in the last two clauses of the V Amendment.

Heiner v. *Donnan*, 285 U. S. 312 S. C. 76 L. C. Ed., 501, 506;
Coolidge v. *Long*, 282 U. S. 582, 596.

And the provisions of the V Amendment to the Constitution are a protection to the alien friend equally with the citizen.

Russian Fleet v. *United States*, 282 U. S., 481, 489;
Wong Wing v. *United States*, 163 U. S., 228, 238.

It follows that none of these decisions on the taxing powers of the States can be differentiated from the case at bar on any theory that the United States Government has a broader jurisdiction to impose taxes within *its* territorial limits, than a State has within *its* territorial limits.

The inherent weakness of the ruling in *Blackstone* v. *Miller* (188 U. S. 189), and the cause of its being finally overruled, was due entirely to an element, common to all sovereign powers, in cases of taxation of property as such or of its transfer, viz.: That the property sought to be taxed *must* itself be within the territorial limits of the taxing sovereign. And when this court definitely decided that bonds were not the property themselves, but only evidences of the property, and were consequently within the scope of the doctrine *mobilia sequuntur personam* (277 U. S. 1, 14-16), the reversal of the rule in *Blackstone* v. *Miller* was inevitable.

Counsel for the government, in the Court below, quoted at some length from the opinion of this court in *United States* v. *Bennett*, 232 U. S. 299, as supposedly supporting their doctrine, of inapplicability of this territorial limitation of tax-

ing sovereignty to the United States. But they omitted to notice that the taxing power of the United States over property or its transfer was in that opinion expressly declared to be "co-extensive with the limits of the United States". In other words, that decision itself mentioned the existence of the precise limitation which we invoke, and which counsel for the government seek to ignore.

It is no more possible for the United States to bring property within the limits of the United States by a fiction so as to confer on itself sovereignty to tax it, than it is for a State to do so. Fictions no more confer sovereignty than they do jurisdiction. And no sovereign differs from any other in possessing such a power.

> "The power of taxation, however vast in its character "and searching in its extent, is necessarily limited to "subjects within the jurisdiction of the State. These "subjects are persons, property and business. Whatever "form taxation may assume, whether as duties, imposts, "excises or licenses, it must relate to one of these sub-"jects."
>
> State Tax on Foreign Held Bonds, 15 Wall. 300.

If the several States lack that power over foreign-owned bonds, because the property sought to be taxed is not within *their* respective territorial limits, the Federal Government equally lacks it when similar property sought to be taxed is not within *its* territorial limits. Both State and Nation are sovereign powers. Both exercise their sovereign powers of taxation of property only within their respective territorial limits, and both under the fundamental identical limitations imposed by the Fifth and Fourteenth Amendments.

This doctrine of taxation of property is in no degree affected by the fact that the Government may impose a tax on an absent citizen as such. So may a State. That jurisdiction to tax rests on the citizenship in each case. But power to impose *estate taxes* has no such basis in mere citizenship, and necessarily rests on the situs of the property

itself (270 U. S. 69, 80). That situs cannot be adjudicated on different principles to suit the convenience or desires of particular governments.

Moreover, the case of the estate of a non-resident friendly alien not in business here presents no opportunity for a tax predicated on citizenship, on residence or on business.

It follows that the statute, if construed so as to include property not within the territorial limits of taxing sovereignty of the United States, becomes *ipso facto* ineffective and void. A construction of an Act of Congress that leads to such a result is rejected whenever possible.

> *Russian Fleet* v. *United States*, 282 U. S., 481, 491;
> *Phelps* v. *United States*, 274 U. S., 341.

If the construction of the act adopted below is adopted here the decision below must, of course, be affirmed. If that construction be not adopted, and it is thought that Congress intended to exceed its powers of taxation, the decision below must still be affirmed, for, if construed so as to impose an estate tax on such bonds owned by a non-resident friendly alien decedent, not engaged in business here, the act is unconstitutional.

Respectfully submitted,

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CHARLES ELMORE

IN THE

Supreme Court of the United States of America

OCTOBER TERM, 1932.

No. 496.

DAVID BURNET, Commissioner of Internal Revenue,
Petitioner,

vs.

ERNEST BROOKS, HAROLD WILSON BROOKS, and WALTER DOUGLAS BROOKS, as Executors of the Will of ERNEST AUGUSTUS BROOKS,
Respondents.

MOTION AND BRIEF OF AMICUS CURIAE.

EDWARD N. PERKINS,
Amicus Curiae.

IN THE

Supreme Court of the United States of America

OCTOBER TERM 1932.

No. 496.

DAVID BURNET, Commissioner of Internal Revenue,
Petitioner,
v.
ERNEST BROOKS, HAROLD WILSON BROOKS, and WALTER DOUGLAS BROOKS, as Executors of the Will of ERNEST AUGUSTUS BROOKS,
Respondents.

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE.

Now comes Edward N. Perkins, of 15 Broad Street, New York City, and moves this Honorable Court for leave to file the annexed brief as amicus curiae, the consent of counsel for the petitioners and of counsel for the respondent having been first obtained. The undersigned asks this leave as counsel for certain estates in process of administration, having large sums of tax-money at issue which will be materially affected by the outcome in the present cause.

EDWARD N. PERKINS,
Office and Post-office Address:
15 Broad Street,
New York, N. Y.

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IN THE

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DAVID BURNET, Commissioner of Internal Revenue,
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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF AMICUS CURIAE.

Statement by Counsel.

This brief is submitted on behalf of BEVERLEY R. ROBINSON, of New York City, as executor of the will of Marshall Owen Roberts, deceased, late of London, England, and on behalf of ARTHUR W. BUTLER, as executor of the will of Edith Lyman Collins, Marquise de Maleissye, deceased, late of Cap d'Ail, France.

Facts.

The facts relevant to the issue to be discussed in this brief are that the decedent died domiciled in Cuba leaving among other things bonds, being obligations of debtors

citizens of and domiciled in the United States of America, physically present within the United States, which the government of the United States has claimed the right to tax under section 303(b) of the Revenue Act of 1924 (43 Stat. 253).

The above-mentioned decedent Marshall Owen Roberts died domiciled in England a British subject leaving securities similarly situated as those in the case at bar. The above-mentioned Marquise de Maleissye died domiciled in and a citizen of France leaving securities similarly situated.

Summary of Argument.

I.

Due process of law does not admit of a state's taxing a transfer at death of which a territorial situs cannot be found within its jurisdiction. The due process clause of the Fourteenth Amendment forbids it. (*Frick* v. *Pennsylvania*, 268 U. S. 473; *Farmers Loan and Trust Co.* v. *Minnesota*, 280 U. S. 204; *Baldwin* v. *Missouri*, 281 U. S. 586; *First National Bank of Boston* v. *Maine*, 284 U. S. 312.) The fact that in the cases cited two states were seeking to tax cannot be determinative. It cannot be unconstitutional for both states to tax unless for the reason that it is unconstitutional for one of the two to tax. The holding in each case cited is that it is unconstitutional for a state where situs cannot be found to tax.

II.

In the case of intangibles like bonds or shares the only situs is at the domicile of the decedent. This is held by the cases cited above.

III.

The transfer at the death of a non-resident of the United States of bonds of, or shares in, an American corporation, has an exclusive situs at the domicile. If it is true that there can be a situs in one state of the Union only, as held in the cases cited, it is necessarily true for the same reasons that there can be a situs in one country only.

IV.

If it is a violation of due process for a state to tax without situs, it is also so for the United States to, since the due process clause affecting the states under the Fourteenth Amendment, and that affecting the national government under the Fifth Amendment, are of identical significance and purport. (*Heiner* v. *Donnan,* 285 U. S. 312.)

ARGUMENT.

I.

It is now settled that due process of law does not admit of taxing a transfer at death unless the situs of the transfer is within the jurisdiction of the state laying the tax.

This, it is submitted, is the result of the holdings of this court in *Frick* v. *Pennsylvania* (268 U. S. 473), *Farmers Loan and Trust Co.* v. *Minnesota* (280 U. S. 204), and *First National Bank of Boston* v. *Maine* (284 U. S. 312).

The reason is, that it is held in each case (1) that one state only could tax and (2) that that one was the state of the situs. It was held, therefore, that a state where the situs was not, could not tax. And it was held a violation of due

process of law, under the Fourteenth Amendment, for the state where the situs was not, to tax.

The criticism directed to the evil of taxation of the same thing or event at the same time by two or more states, in the cases cited, is not (we submit) a determinative fact, because it was necessary, to reach the conclusion, to hold that a particular state could not tax. It could not be unconstitutional for two states to tax. It must be constitutional for both states to tax, *unless* it is unconstitutional for *one* of them to. In *Frick* v. *Pennsylvania* it was not unconstitutional for Pennsylvania *and* New York, or Massachusetts, to tax. It was unconstitutional for *one* of them, Pennsylvania, to tax. The reason is, as given, that situs could not be found in Pennsylvania. So, in the other cases, situs could not be found in Minnesota, or in Maine. The proposition decided in each case is, that it is unconstitutional for one particular state to tax. And in each case that one, as the opinions are careful to point out, is identified by the fact that situs cannot be found there. The necessary generalization is, that due process does not admit of taxation in respect of something of which the situs cannot be found within the jurisdiction of the taxing sovereign.

One of the basic propositions supporting the decision in *Frick* v. *Pennsylvania* is this (268 U. S. p. 489):

> "* * * while a state may so shape its tax laws as to reach every object which is under its jurisdiction it cannot give them any extra-territorial operation; * * *"

The following is quoted (along with the rest of the passage) on the same page, from *Union R. T. Co.* v. *Kentucky* (199 U. S. 194, at p. 204):

> "It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power. * * *."

That intangibles, such as rights of action on bonds (*Farmers Loan and Trust Co.* v. *Minnesota*) and corporate

shares (*First National Bank of Boston* v. *Maine*), as to the situs of their transfer at death, are limited to a single situs which must be within one jurisdiction or another, is proved by those two cases. In the latter case the court said (284 U. S. p. 326):

> "In its application to death taxes, the rule rests for its justification upon the fundamental conception that the transmission from the dead to the living of a particular thing, whether corporeal or incorporeal, is an event which cannot take place in two or more states at one and the same time."

The generalization that due process of law does not admit of taxation in respect of something of which the situs cannot be found within the jurisdiction of the taxing sovereign, therefore applies to transfers at death of intangibles like bonds or shares in a corporation, as well as to such transfers of tangible property.

II.

In the case of intangibles like bonds or shares, the exclusive situs for death transfer taxes is the owner's domicile.

This is clear on the authorities already cited. That there is always one exclusive situs is stated vividly in the opinion in *First National Bank of Boston* v. *Maine* thus (284 U. S. pp. 326, 327):

> "* * *. Due regard for the processes of correct thinking compels the conclusion that a determination fixing the local situs of a thing for the purpose of transferring it in one state, carries with it an implicit denial that there is a local situs in another state for the purpose of transferring the same thing there."

Each of the cases cited shows that the exclusive situs of intangibles like bonds or shares of stock, for the purpose of transferring them at death, is the owner's domicile. *Baldwin* v. *Missouri* (281 U. S. 586) is another member of this line. It shows also that mere physical presence in a locality other than the domicile of the evidences of right, such as stock certificates or bonds, is immaterial.

III.

In the case of proposed taxation by the United States of the transfer at death of bonds of, or shares in, an American corporation, owned by a non-resident alien decedent, the state of domicile, be it Cuba or any other foreign state, is the exclusive local situs for the purpose of the transfer.

The reason is, that as between states of the Union, this is settled by the authorities cited, and, if true as between states of the Union, it is also true as between national states. We submit that, in determining the *fact of situs*, there is no room or ground whatever to differentiate a case between Minnesota and New York from a case between Great Britain, or Cuba, and this country. A man dies domiciled in Cuba, or in Great Britain, owning bonds of American debtors lying in a vault in America. It is unquestioned that these have a situs for taxation in the country of domicile. If it is true, as between sovereign states of the Union, it is equally true, for the very same reasons, as between two national states, that "the trans-"mission from the dead to the living of a particular thing, "whether corporeal or incorporeal, is an event which can-"not take place in two or more states at one and the same "time", that "the opposite view must be rejected as con-"noting a physical impossibility", that "in the case of in-"tangible property, it must be rejected as involving an in-"herent and logical self-contradiction", and that "due

"regard for the processes of correct thinking compels the "conclusion that a determination fixing the local situs of a "thing for the purpose of transferring it in one state car- "ries with it an implicit denial that there is a local situs "in another state for the purpose of transferring the same "thing there". If it is true as between the states of the Union, so it is true as between national states that "a "transfer from the dead to the living of any specific prop- "erty is an event single in character and is effected under "the laws, and occurs within the limits, of a particular "state". (*First National Bank of Boston* v. *Maine*, 284 U. S. pp. 326 and 327.)

Accordingly we submit that these authorities settle it that bonds, and the transfer thereof at death, have their situs at the place of the decedent's domicile, which, in this case, is not in the United States; that they cannot have two situs; that therefore they have no situs at the place of the debtor's domicile.

IV.

It is equally unconstitutional for the United States, as for one of the states, to tax a transfer of which the situs cannot be found within its jurisdiction.

Our first proposition (page 3, *et seq., supra*), which we submit is established, is that the Fourteenth Amendment does not admit of taxation by a power within the jurisdiction of which situs cannot be found, for the reason that such action does not accord with due process of law. It is submitted that if "due process of law", according to the meaning of that expression in the Fourteenth Amendment, is incompatible with taxation by a state of the Union of that which has no situs in it, the same thing would necessarily be true as applied to taxation by the United States if the Fourteenth Amendment affected the conduct of the United States. If so, it follows that the "due process clause" of

the Fifth Amendment prohibits taxation by the United States in the present case, because the expressions "due process of law" in the Fourteenth and the Fifth Amendments are of identical significance. (*Heiner* v. *Donnan*, 285 U. S. 312.)

Respectfully submitted,

EDWARD N. PERKINS,
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Supreme Court of the United States

OCTOBER TERM 1932.

No. 496.

DAVID BURNET, Commissioner of Internal Revenue,
Petitioner,

against

ERNEST BROOKS, HAROLD WILSON BROOKS and WALTER DOUGLAS BROOKS, as Executors of the Last Will and Testament of Ernest Augustus Brooks, deceased,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

CHARLES ANGULO,
RUSSELL L. BRADFORD,
Counsel for CITY BANK FARMERS TRUST COMPANY, as Ancillary Executor as aforesaid, *Amici Curiae.*

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM 1932.

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DAVID BURNET, Commissioner of Internal Revenue,
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Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

MAY IT PLEASE THE COURT:

The undersigned as counsel for City Bank Farmers Trust Company of New York, as ancillary executor of the Last Will and Testament of Urban Hanlon Broughton, late of England, deceased, respectfully move this Honorable Court for leave to file the accompanying brief in this case, as *amici curiae.*

CHARLES ANGULO,
RUSSELL L. BRADFORD,
Counsel for CITY BANK FARMERS TRUST COMPANY, as Ancillary Executor as aforesaid, *Amici Curiae.*

tions and shares of stock of a foreign corporation. These securities were held in New York. They were not used in connection with any business carried on by or for the decedent within the United States.

The Commissioner included these securities in determining the value of the gross estate of the decedent "situated in the United States", and computed and assessed the federal estate tax accordingly.

The Court below held that the Commissioner's construction of the statute was erroneous and that the words "situated in the United States" as used in Section 303(b) of the Revenue Act of 1924 should *not* be construed as intended to include intangible property owned by a nonresident decedent, merely because the certificate or other paper evidencing the ownership thereof, happened to be physically present in the United States at the time of the decedent's death.

ARGUMENT.

I.

It is respectfully submitted that the construction of the statute by the Circuit Court of Appeals is correct.

The subject of the tax is the transmission of property from the dead to the living (*Heiner* v. *Donnan*, 285 U. S. 312, 322). "A transfer from the dead to the living of any specific property is an event single in character and is effected under the laws, and occurs within the limits of a particular state * * *" (*First National Bank* v. *Maine*, 284 U. S. 312, 327; *Baldwin* v. *Missouri*, 281 U. S. 586). Such an event "*in the nature of things*" cannot occur in two or more places at one and the same time (*First National Bank* v. *Maine*, *supra*, at 326, 327).

The statute, to say the least, should not be given a construction which would bring it into conflict with this "fundamental conception" of the common law (*First*

National Bank v. *Maine, supra,* 326), concerning the nature of the transmission of property at death.

In its general provisions, the statute seems *implicitly* to recognize that it is only when the taxable event occurs *within* the United States that it constitutes an appropriate subject of taxation by this country. In the case of a non-resident decedent, it purports to tax transmissions of property *only* when such property is "situated in the United States".

Since, in the case of real estate and tangible personalty the transmission of the property occurs at the place where such property is physically situated, and in the case of intangibles at the place where they are situated *in contemplation of law,* it is clear that the statutory language is at least susceptible of a construction which will bring it into conformity with the ordinary rules of the common law applicable to the subject matter (*State Tax on Foreign-Held Bonds,* 15 Wall. 300; *Union Transit Company* v. *Kentucky,* 199 U. S. 194; *Blodgett* v. *Silberman,* 277 U. S. 1; *The Farmers' Loan and Trust Company* v. *Minnesota,* 280 U. S. 204; *Baldwin* v. *Missouri, supra; Beidler* v. *South Carolina Tax Commission,* 282 U. S. 1; *First National Bank* v. *Maine, supra*).

At best, therefore, the argument of the petitioner amounts to this, viz., that such a construction is not inevitable and that the general language of the statute is susceptible of another and different construction under which the tax would be extended to transmissions of property that, in contemplation of law, take place in foreign countries.

But under settled rules of statutory construction there are at least, *four* presumptions which would defeat the construction thus urged by the petitioner. These four presumptions are:

First: Where a statute is open to two constructions that construction ought to be preferred which is consonant with the common law (*Rex* v. *Salisbury* (1901)

1 Q. B. 573, 577). Since the common law "constitutes the foundation and primarily the body and soul of our jurisprudence, every statutory enactment is construed by its light and with reference to its cognate principles" (*Lewis'-Sutherland Statutory Construction*, 2d Ed., Vol. II, p. 861).

> "In construing a statute regard must be had to the ordinary rules of law applicable to the subject-matter, and these rules must prevail, except in so far as the statute shows that they are to be disregarded; and the burden of showing that they are to be disregarded rests upon those who seek to maintain that proposition." (*Attorney General* v. *Beech*, (1898) 2 Q. B. 147, 155; 67 L. J. Q. B. 585, 570, per Chitty, L. J.).

Certainly it cannot be doubted that according to the ordinary rules of the common law applicable to the subject matter, the intangibles here involved were situated at the domicile of the deceased, and that it was there, and not in the United States, that their transmission took place upon his death.

The House of Lords in *Thomson* v. *Advocate General* (1845) 12 Cl. & F. 1, 29, in construing the general terms of an English statute imposing a legacy duty on "every legacy given by a will or testamentary instrument of any person", said:

> "If a testator has died out of Great Britain with a domicile abroad, although he may have personal property that is in Great Britain at the time of his death, in contemplation of law that property is supposed to be situated where he was domiciled, and, therefore, it does not come within the act: this seems to be the most reasonable construction to be put upon the Act of Parliament * * *."

Second: General words in a statute are never construed so as to extend to subjects which are beyond the territorial jurisdiction of the legislature.

It seems to us that this was the underlying rule of decision in *Eidman* v. *Martinez,* 184 U. S. 578, in which the identical question here presented arose under the federal succession tax of 1898.

In that case this court said at page 592:

> "We decline to hold the tax involved in this case applicable to this estate *because the words of the statute do not require it, and because the thing taxed, that is, the transmission of the property to the legatees or next of kin, takes place in a foreign country.*" (Italics ours.)

(See also *Thomson* v. *Advocate General, supra,* cited with seeming approval in *Eidman* v. *Martinez, supra; U. S.* v. *Goelet,* 232 U. S. 293, 297; *Maxwell on the Interpretation of Statutes,* p. 169.)

Third: In the interpretation of tax statutes their provisions are not to be extended by implication beyond the clear import of the language used. Doubts, if any, should be resolved in favor of the taxpayer and against the government (*Gould* v. *Gould,* 245 U. S. 151, 153; *United States* v. *Goelet,* 232 U. S. 293; *Eidman* v. *Martinez, supra,* 583; *American Net & Twine Co.* v. *Worthington,* 141 U. S. 468).

Fourth: The general rule is that where there are two possible constructions of a statute one of which will give rise to grave constitutional doubts, and the other of which avoids such doubts, the latter will be adopted (*United States* v. *Bennett,* 232 U. S. 299; *United States* v. *Delaware & Hudson Co.,* 213 U. S. 366; *Carey* v. *South Dakota,* 250 U. S. 118).

Clearly, the petitioner has failed to overcome these presumptions. Even apart from these presumptions, the general character of the statutory provisions suggests that Congress contemplated that they would be supplemented by the ordinary rules of the common law applicable to the subject-matter.

Blackstone v. *Miller*, 188 U. S. 189, and *Wheeler* v. *Sohmer*, 233 U. S. 434, relied on by the petitioner, involved no question of statutory construction. The New York death transfer tax law involved in these cases had been construed by the courts of that State as intended to reach the transfer of the particular intangibles there in question. This court was careful to point out that the State decisions concerning the construction of the statute were, of course, binding upon it (*Blackstone* v. *Miller*, *supra*, 203; *Wheeler* v. *Sohmer*, *supra*, 438), and that the only question presented was whether the statute as so construed violated the Fourteenth Amendment to the Constitution of the United States.

In both cases it was implicitly recognized that the general rule of law was that intangible property was situated at the domicile of the owner (*Blackstone* v. *Miller*, *supra*, 204; *Wheeler* v. *Sohmer*, *supra*, 438).

It is submitted that the petitioner is mistaken in his premise that *Blackstone* v. *Miller*, *supra*, and *Wheeler* v. *Sohmer*, *supra*, effected a change in that general rule.

Those two cases merely dealt with the constitutional power of a State to create by specific statutory enactment a *different* situs for such intangibles.

Manifestly, therefore, *Blackstone* v. *Miller* and *Wheeler* v. *Sohmer* cannot aid the petitioner on the question of statutory construction,—unless they be coupled with the assertion that in construing the general language of this statute Congress must be presumed to have intended to tax everything that it thought it had constitutional power to tax. But it is respectfully submitted that there is no foundation in law for indulging in any such presumption. On the contrary such a presumption would come in direct conflict with the well established principle that in the interpretation of tax statutes their provisions are not to be extended by implication beyond the clear import of the language used, and that all doubts are to be resolved in favor of the taxpayer. *Heiner* v. *Colonial Trust Co.*, 275 U. S. 232,

cited by the petitioner, manifestly did not intend to overturn that rule. That case merely involved an asserted *exemption* which did violence to the express terms of the statute.

The fact that there is a provision in the statute specifically creating a second situs in the case of stock of an American corporation in conflict with the ordinary rule of the common law governing the situs of intangibles, is scarcely favorable to the petitioner's contention, in view of the well-established maxim of statutory construction *expressio unius est exclusio alterius.* While the petitioner suggests a possible explanation for the inclusion of this specific provision concerning American stocks, we submit that the explanation at most merely counterbalances the unfavorable effect of the legal maxim referred to.

The same is true as regards those particular provisions of the statute specifically dealing with the proceeds of insurance and moneys on deposit with bankers. In these instances, the statutory rule declared is in accord with the ordinary legal rule governing the situs of intangibles. In dealing with the last mentioned specific provisions of the statute, the petitioner himself apparently invokes the maxim *expressio unius est exclusio alterius.* But as pointed out by the Court below, the inclusion of these specific statutory declarations is readily explainable. In the case of proceeds of life insurance policies, this explanation is to be found in the history of the statutory provisions involved, and in the case of money on deposit with bankers in the importance from the viewpoint of international trade and finance of having such an express declaration incorporated in the statute.

Therefore, looking at the matter in the light most favorable to the petitioner's contention, it would seem that the most that fairly can be claimed by him is that an examination of these specific statutory provisions in search of

the Congressional intent, yields no satisfactory results. Thus we must revert again to the general provisions and to the general presumptions applicable to their construction.

As to the Commissioner's argument based upon the departmental regulations, it may be conceded that where such regulations pertain to a purely administrative matter, the subsequent enactment of a statute by Congress, in substantially similar terms to those contained in the prior statutes under which the regulations were promulgated, fairly may be considered as an implied statutory confirmation of such regulations. So in *National Lead Company* v. *United States*, 252 U. S. 140, and *Brewster* v. *Gage*, 280 U. S. 327, relied on by the petitioner, the matter in question was purely of an administrative character. In the former case the question was as to the correct method of computing the amount of a "draw-back" granted by the statute in connection with certain import duties, and in the latter case, the question concerned the method of computing the amount of the gain or loss under the income tax law where the property had been acquired by the taxpayer under a will. But in the case at bar, the question involved is of a much more fundamental character. It concerns the determination of the very subject of the tax itself. It seems to us that a distinction should be drawn between those subject matters that are appropriately within the sphere of administrative regulation, and those that concern the very substance of the law itself, and which can only be appropriately dealt with by the judiciary (*U. S.* v. *United Verde Copper Co.*, 196 U. S. 207, 215).

Moreover, in our view the regulation in question was at variance with the judicial decisions governing the situs of intangible property. It is submitted that the general rules of the common law governing the situs of intangibles were the same at the time the regulation was promulgated as they are today. *Blackstone* v. *Miller* and

Wheeler v. *Sohmer* did not change these rules. They dealt with constitutional questions only. Thus, in so far as the regulation in question was in conflict with the rules of law it was invalid, and manifestly the re-enactment of the statute should not be deemed an implied statutory confirmation of an *invalid* regulation. Finally, in the present instance, the administrative construction of the statute was not in all respects uniform and consistent (*Burnet* v. *Chicago Portrait Co.*, 285 U. S. 1; *Shenton* v. *U. S.*, 53 Fed. (2nd) 249, 250). Stock of a foreign corporation was not included in the earlier regulations (Petitioner's Brief, p. 13).

DeGanay v. *Lederer*, 250 U. S. 376, relied on by the petitioner is, we submit, clearly distinguishable. In that case, the securities were held in this country by an agent under a power of attorney which authorized him:

> "To sell, assign, transfer any stocks, bonds, loans, or other securities now standing or that may hereafter stand in my name on the books of any and all corporations, national, state, municipal or private, to enter satisfaction upon the record of any indenture or mortgage now or hereafter in my name, or to sell and assign the same and to transfer policies of insurance, and the proceeds, also any other moneys to invest and reinvest in such securities as they may in their discretion deem safe and judicious to hold for my account; to collect and receipt for all interest and dividends, loans, stocks, or other securities now or hereafter belonging to me, to endorse checks payable to my order and to make or enter into any agreement or agreements they may deem necessary and best for my interest *in the management of my business and affairs* * * * ".

The Court found that the securities had become "completely localized in the United States". It held that, "*Thus* situated and held, and *with the authority given to*

the local agent over them, we think the income derived is clearly from property within the United States within the meaning of Congress as expressed in the statute under consideration". The case involved an income tax which of course differs materially from an estate tax, and this Court was careful to point out that "the question certified is *limited* to the net income collected *by virtue of the power of attorney* * * * " (See page 379).

It is therefore submitted that the above mentioned presumptions should control the construction of the statute.

II.

In view of recent decisions of this Court (*The Farmers' Loan and Trust Company* v. *Minnesota, Baldwin* v. *Missouri, Beidler* v. *South Carolina Tax Commission, First National Bank* v. *Maine*, all *supra*), it would seem indisputable that the construction contended for by the petitioner would at least give rise to serious doubts concerning the constitutional validity of the statute. These decisions, we submit, may not be dismissed with the simple statement that they only involved questions of double taxation as between States of the Union, and are not applicable to the Federal Government. It is true that one of the reasons suggested by the Court in *The Farmers' Loan and Trust Company* case, *supra*, for preventing double taxation of intangibles, was the desirability of eliminating discord among the several States. However, the legal principles which the court expounded in the said case and in the succeeding cases of the same series, and particularly in the last case of the series, *First National Bank* v. *Maine, supra*, may not be confined within any such narrow limits. They concern the inherent nature and essential character of a transmission of property from the dead to the living. That essen-

tial nature and character, of course, is in no way dependent upon the relations between the States; neither is it dependent on whether the transaction is sought to be taxed by a State or the Federal Government. It is wholly independent of all such considerations for it is based upon legal principles of ancient origin, and necessarily results from fundamental legal conceptions.

In the *First National Bank* v. *Maine, supra,* this Court said that, "A transfer from the dead to the living of any specific property is an event *single in character* and is effected under the laws, and occurs within the limits, of a particular state * * *" (p. 327). It said further, that it is a "* * * *fundamental conception* that the transmission from the dead to the living of a particular thing, whether corporeal or incorporeal, is an event which *cannot* take place in two or more states at one and the same time" (p. 326). And again (p. 327) that such a transmission, "*in the nature of things*" can take place in one place *only.* The Court further said:

> "In respect of tangible property, the opposite view must be rejected as connoting a *physical impossibility;* in the case of intangible property, it must be rejected as involving an *inherent and logical self-contradiction*" (p. 326).

And finally:

> "Due regard for the processes of correct thinking compels the conclusion that a determination fixing the local situs of a thing for the purpose of transferring it in one state, carries with it an implicit denial that there is a local situs in another state for the purpose of transferring the same thing there" (pp. 326-7).

Having decided that the transfer of property at death necessarily must take place in one jurisdiction only, and not in two or more, this Court then went on to determine the particular jurisdiction wherein such transfer actually

occurs. It held that in the case of corporeal or tangible property the transfer actually occurs in the place where the property is physically present. In the case of intangible or incorporeal property it held that the transfer actually takes place at the domicile of the decedent. Accordingly, it could take place nowhere else.

True it is that in the one case, viz., that of corporeal property, the legal conclusion rests upon a physical fact; and in the other case, viz., that of intangible or incorporeal property, the legal conclusion is based upon a legal maxim of ancient origin, viz., *mobilia sequuntur personam*, coupled with the obvious logical conclusion that since a thing cannot be in two places at one and the same time, "a determination fixing the local situs of a thing for the purpose of transferring it in one state, carries with it an implicit denial that there is a local situs in another state for the purpose of transferring the same thing there." But clearly the binding effect of the resulting legal conclusion must be the same in both cases.

Manifestly, therefore, in so far as the decisions in question describe the legal nature of transmissions of property from the dead to the living, they must be applicable, regardless of the particular taxable entity seeking to subject such a transmission to tax.

The only question that can arise is whether the Federal power of taxation unlike the power of taxation possessed by the States, may extend to a transmission of property which actually occurs outside of the United States. In other words, is the Federal power of taxation limited to subjects within its jurisdiction, or is this limitation confined to the States?

In *State Tax on Foreign-Held Bonds*, 15 Wall. 300, this Court said at page 319 that the power of taxation, however vast in its character and searching in its extent, is *necessarily* limited to subjects within the jurisdiction of the state. It is true that the court was discussing the power of taxation of the several States, but it seems in-

credible that such an inherent limitation upon the power of taxation itself should not also be applicable to the Federal Government.

In *United States* v. *Erie Railroad*, 25 Fed. Cas. 1019 (reversed on other grounds in 106 U. S. 327), Chief Justice Waite said at p. 1021:

> "The power of the United States is limited to persons, property and business within their jurisdiction, as much as that of a state is limited to the same subjects within its jurisdiction."

In *Frick* v. *Pennsylvania*, 268 U. S. 473, this Court said that for a State to impose a tax without jurisdiction of the subject matter was "mere *extortion* and in contravention of due process of law." Certainly it is no longer an open question in this Court that the Fifth Amendment to the Constitution is a limitation upon the exercise of the Federal taxing power, and that it prevents extortion and confiscation under the guise of taxation (*Nichols* v. *Coolidge*, 274 U. S. 531, 542; *Heiner* v. *Donnan*, 285 U. S. 312).

But furthermore, this Court has repeatedly held that the restraints imposed upon Congress by virtue of the due process clause of the Fifth Amendment are identical with those imposed upon the several States by virtue of the same clause in the Fourteenth Amendment (*Heiner* v. *Donnan, supra*, 326; *French* v. *Asphalt Paving Co.*, 181 U. S. 324, 329; *Twining* v. *New Jersey*, 211 U. S. 78, 101; 3 *Willoughby on the Constitution of the United States*, p. 1682; *Taylor on Due Process of Law*, p. 243).

Therefore, it is difficult to see why *The Farmers' Loan and Trust Company* case, and other cases of the same series, should not be as decisive of the constitutional question involved here as they are of the general principles of law governing the *situs* of intangibles and the nature and character of transmissions of property at death.

United States v. *Bennett*, 232 U. S. 299, and *Cook* v. *Tait*, 265 U. S. 47, cited by the petitioner, are readily distinguishable. Unquestionably, the Federal Government has an international aspect which the States have abdicated, and which enables it to impose a tax upon the basis of *citizenship*, where a similar exaction by one of the constituent States could not be constitutionally upheld.

But the tax that we are here considering does not purport in any way to be based upon citizenship or nationality. Citizenship or nationality is not mentioned, —a silence that becomes doubly significant when we observe that in another part of the same act, viz., that dealing with the income tax law, *that* tax is specifically imposed on the basis of citizenship in the case of American citizens residing abroad.

Taxes of he type here involved, rest upon the power of the state imposing them, to control the privilege of succession, and unless the transmission of the property at death occurs within the jurisdiction of a given state there is wanting on the part of such State any real taxable relationship to the event which is the subject of the tax (*First National Bank* v. *Maine*, *supra*, 329).

Moreover, the decedent here was an alien, viz., a subject of the King of England. Therefore, his nationality would in no event furnish a basis for the tax. As an alien friend, he is entitled to the protection of the Fifth Amendment to the Federal Constitution. This Court has so held in the case of expropriation of property under the power of eminent domain (*Russian Fleet* v. *United States*, 282 U. S. 481, 489). The same rule would seem to apply to a case where such property is sought to be *confiscated* under the guise of taxation (*Frick* v. *Pennsylvania*, 268 U. S. 473, 492; *Nichols* v. *Coolidge*, 274 U. S. 531, 542).

It is therefore submitted that the question of the constitutional validity of the statute if construed in accord-

ance with the petitioner's contention, is at least sufficiently serious to require the rejection of that construction.

Respectfully submitted,

CHARLES ANGULO,
RUSSELL L. BRADFORD,
Counsel for CITY BANK FARMERS TRUST COMPANY as Ancillary Executor of Last Will and Testament of URBAN HANLON BROUGHTON, deceased, *Amici Curiae.*

SUPREME COURT OF THE UNITED STATES.

No. 496.—October Term, 1932.

David Burnet, Commissioner of Internal Revenue, Petitioner,
vs.
Ernest Brooks, Harold Wilson Brooks and Walter Douglas Brooks, as Executors of the Will of Ernest Augustus Brooks.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 13, 1933.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

Respondents contested the determination of the Commissioner of Internal Revenue in including in the gross estate of decedent certain intangible property. Decedent, who died in October, 1924, was a subject of Great Britain and a resident of Cuba. He was not engaged in business in the United States. The property in question consisted of securities, viz., bonds of foreign corporations, bonds of foreign governments, bonds of domestic corporations and of a domestic municipality, and stock in a foreign corporation, and also of a balance of a cash deposit.[1] Some of the securities, consisting of a stock certificate and bonds, were in the possession of decedent's son in New York City, who collected the income and placed it to the credit of decedent in a New York bank. Other securities were in the possession of Lawrence Turnure & Company in New York City who collected the income and credited it to decedent's checking account, which showed the above mentioned balance in his favor. None of the securities was pledged or held for any indebtedness. Finding these facts, the Board of Tax Appeals

[1]The property was scheduled as follows:

(a) Bonds of foreign corporations and accrued interest	$24,384.97
(b) Bonds of foreign governments and accrued interest	55,610.49
(c) Bonds of domestic corporations and accrued interest	460,315.32
(d) Bonds of a domestic municipality and accrued interest	15,073.57
(e) Stock in a foreign corporation (Cuban)	50,000.00
(f) Cash on deposit with Lawrence Turnure & Company	14,517.98

decided that the property should not be included in the decedent's gross estate for the purpose of the Federal Estate Tax (22 B. T. A. 71), and the decision was affirmed by the Circuit Court of Appeals. 60 F. (2d) 890. This Court granted certiorari, 287 U. S. —.

The provisions governing the imposition of the tax are found in the Revenue Act of 1924, c. 234, 43 Stat. 253, 303-307, and are set forth in the margin.[2] Two questions are presented,—(1) whether the property in question is covered by these provisions, and (2) whether, if construed to be applicable, they are valid under the Fifth Amendment of the Federal Constitution. The decisions below answered the first question in the negative.

First. The first question is one of legislative intention. In the case of a nonresident of the United States, that part of the gross estate was to be returned and valued "which at the time of his death is situated in the United States". In interpreting this

[2] "Sec. 301. (a) In lieu of the tax imposed by Title IV of the Revenue Act of 1921, a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 303) is hereby imposed upon the transfer of the net estate of every decedent dying after the enactment of this Act, whether a resident or nonresident of the United States:" (rates follow) . . .

"Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

"(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate; . . .

"Sec. 303. For the purpose of the tax the value of the net estate shall be determined—

"(a) In the case of a resident, by deducting from the value of the gross estate— . . .

"(b) In the case of a nonresident, by deducting from the value of that part of his gross estate which at the time of his death is situated in the United States—

"(1) That proportion of the deductions specified in paragraph (1) of subdivision (a) of this section which the value of such part bears to the value of his entire gross estate, wherever situated, but in no case shall the amount so deducted exceed 10 per centum of the value of that part of his gross estate which at the time of his death is situated in the United States; . . .

"(c) No deduction shall be allowed in the case of a nonresident unless the executor includes in the return required to be filed under section 304 the

clause, regard must be had to the purpose in view. The Congress was exercising its taxing power. Defining the subject of its exercise, the Congress resorted to a general description referring to the situs of the property. The statute made no distinction between tangible and intangible property. It did not except intangibles. It did not except securities. Save as stated, it did not except debts due to a nonresident from resident debtors. As to tangibles and intangibles alike, it made the test one of situs, and we think it is clear that the reference is to property which, according to accepted principles, could be deemed to have a situs in this country for the purpose of the exertion of the Federal power of taxation. Again, so far as the intention of the Congress is concerned, we think that the principles thus impliedly invoked by the statute were the principles theretofore declared and then held. It is quite inadmissible to assume that the Congress exerting Federal power was legislating in disregard of existing doctrine, or to view its intention in the light of decisions as to State power which were not rendered until several years later.[3] The argument is pressed that the reference to situs must, as to intangibles, be taken to incorporate the principle of *mobilia sequunter personam* and thus, for example, that the bonds here in question though physically in New York should be regarded as situated in Cuba where decedent resided. But the Congress did not enact a maxim. When the

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value at the time of his death of that part of the gross estate of the nonresident not situated in the United States.

"(d) For the purpose of Part I of this title, stock in a domestic corporation owned and held by a nonresident decedent shall be deemed property within the United States, . . .

"(e) The amount receivable as insurance upon the life of a nonresident decedent, and any moneys deposited with any person carrying on the banking business, by or for a nonresident decedent who was not engaged in business in the United States at the time of his death, shall not, for the purpose of Part I of this title, be deemed property within the United States. . . .

"Sec. 304. (a) . . . The executor shall also, at such times and in such manner as may be required by regulations made pursuant to law, file with the collector a return under oath in duplicate, setting forth (1) the value of the gross estate of the decedent at the time of his death, or, in case of a nonresident, of that part of his gross estate situated in the United States; . . .

[3]The case of Blackstone *v.* Miller, 188 U. S. 189, was not overruled until 1930. See Farmers' Loan & Trust Co. *v.* Minnesota, 280 U. S. 204, 209.

statute was passed it was well established that the taxing power could reach such securities in the view that they had a situs where they were physically located. As securities thus actually present in this country were regarded as having a situs here for the purpose of taxation, we are unable to say that the Congress in its broad description, embracing all property "situated in the United States", intended to exclude such securities from the gross estate to be returned and valued.

The general clause with respect to the property of nonresidents "situated in the United States" is found in the provisions for an Estate Tax of the Revenue Act of 1916, sec. 203 (b), 39 Stat 778, and was continued in the Revenue Acts of 1918, sec. 403 (b), 40 Stat. 1098; of 1921, sec. 403 (b), 42 Stat. 280; and of 1924, sec. 303 (b), the provision now under consideration. Before the phrase was used in the Act of 1916, this Court, in passing upon questions arising under the inheritance tax law of June 13, 1898, sec. 29, 30 Stat. 464 (in a case where the decedent had left "certain Federal, municipal and corporate bonds" in the custody of his agents in New York), recognized that the property would not have escaped the tax, had it been imposed in apt terms, in the view that the property was intangible and belonged to a nonresident. *Eidman* v. *Martinez*, 184 U. S. 578, 582. While that statute was found to be inapplicable, as the property had not passed, within the limitations of the statute, "by will or by the intestate laws of any State or Territory", the opinion conceded the power of Congress "to impose an inheritance tax upon property in this country, no matter where owned or transmitted". *Id.*, p. 592. We see no reason to doubt that it was with this conception of its power that the Congress enacted the later provisions for an estate tax in the case of nonresidents. And before the Revenue Act of 1921 was passed, we had stated the principles deemed controlling in *DeGanay* v. *Lederer*, 250 U. S. 376, in construing the provision of the Income Tax Law of 1913, 38 Stat. 166, imposing a tax upon the net income "from all property owned . . . in the United States by persons residing elsewhere". The decision was upon a certified question with respect to the income of a citizen and resident of France from stocks, bonds, and mortgages secured upon property in the United States, where the owner's agent in the United States collected and remitted the income and had "physical possession of

the certificates of stock, the bonds and the mortgages". The Court said,—"The question submitted comes to this: Is the income from the stock, bonds and mortgages, held by the Pennsylvania Company [the agent], derived from property owned in the United States? A learned argument is made to the effect that the stock certificates, bonds and mortgages, are not property, that they are but evidences of the ownership of interests which are property; that the property, in a legal sense, represented by the securities, would exist if the physical evidences thereof were destroyed. But we are of opinion that these refinements are not decisive of the congressional intent in using the word 'property' in this statute. Unless the contrary appears, statutory words are presumed to be used in their ordinary and usual sense, and with a meaning commonly attributable to them. To the general understanding and with the common meaning attached to such descriptive terms, bonds, mortgages and certificates of stock are regarded as property. By state and federal statutes they are often treated as property, not as mere evidences of the interests which they represent". Having no doubt "that the securities, herein involved, are property", the Court proceeded to the question,—"Are they property within the United States? It is insisted that the maxim *mobilia sequunter personam* applies in this instance and that the situs of the property was at the domicile of the owner in France. But this Court has frequently declared that the maxim, a fiction at most, must yield to the facts and circumstances of cases which require it; and that notes, bonds and mortgages may acquire a situs at a place other than the domicile of the owner, and be there reached by the taxing authority". Then, describing the location of the certificates of stock, bonds and mortgages in question in the possession of the agent in Philadelphia, the Court concluded that the securities constituted "property within the United States within the meaning of Congress as expressed in the statute under consideration". The reference in the statement of this conclusion to the authority of the agent to sell, invest and reinvest was by way of emphasis and is not to be taken as importing a necessary qualification. The Court answered the certified question in the affirmative. *Id.*, pp. 380-383.

Under the Revenue Act of 1916, the Commissioner of Internal Revenue ruled "that Congress has the power and evidenced an

intention" in that act "to impose a tax upon bonds, both foreign and domestic, owned by a non-resident decedent, which bonds are physically situate in the United States" and that "such bonds must be returned as a portion of his gross estate." T. D. 2530. The regulations promulgated by the Treasury Department under the Revenue Act of 1918, interpreting the words "situated in the United States", contained the following: "The situs of property, both real and personal, for the purpose of the tax is its actual situs. Stock in a domestic corporation, and insurance payable by a domestic insurance company, constitute property situated in the United States, although owned by, or payable to, a nonresident. A domestic corporation or insurance company is one created or organized in the United States. Bonds actually situated in the United States, moneys on deposit with domestic banks and moneys due on open accounts by domestic debtors constitute property subject to tax". Regulations No. 37, Art. 60, T. D. 2378, 2910, 3145. This provision, in substance, as to bonds and moneys due (other than insurance moneys and bank deposits which were made the subject of a special statutory provision), was repeated in the regulations under the Revenue Act of 1921, as follows: "Bonds actually within the United States, moneys due on open accounts by domestic debtors, and stock of a corporation or association created or organized in the United States, constitute property having its situs in the United States". Regulations No. 63, Art. 53, T. D. 3384. We find no ground for questioning the intention of the Congress, when in the Revenue Act of 1924 it reenacted the provision as to the property of nonresidents "situated in the United States", to impose the tax with respect t bonds physically within the United States and stock in domestic corporations. *Brewster* v. *Gage*, 280 U. S. 327, 337.

The argument is pressed that the regulations above quoted are silent as to stock owned by nonresidents in foreign corporations when the certificates of stock are held within the United States. We think that the omission is inconclusive. It may be more fairly said that the express terms of these regulations did not go far enough, rather than that, so far as they did go, they failed to express the legislative intent. In the view which identifies the property interest with its physical representative, no sufficient reason appears for holding that bonds were intended to be included, and

not certificates of stock, if these were physically in the United States at the time of death. See *DeGanay* v. *Lederer, supra; Disconto-Gesellschaft* v. *United States Steel Corporation,* 267 U. S. 22, 28, 29. The regulations adopted under the Revenue Act of 1924 expanded the provision as to the "situs of property of nonresident decedents" so as to include stock in foreign corporations when the certificates were held here, by providing,—"Real estate within the United States, stocks and bonds physically in the United States at date of death, moneys due on open accounts by domestic debtors, and stock of a corporation or association created or organized in the United States, constitute property having a situs in the United States". Regulations No. 68, Art. 50, T. D. 3683. The Revenue Act of 1926,, sec. 303 (b), 44 Stat. 73, reenacted the provision as to property of nonresidents "situated in the United States", and the regulation under that Act expressly embraces "certificates of stock, bonds, bills, notes, and mortgages, physically in the United States at date of death" as property "having a situs in the United States," in addition to the clause relating to stock of domestic corporations. Regulations No. 70, Art. 50. And these provisions have been continued. *Id.* 1929 edition.

We do not find that the qualifying provisions of sections 303 (d) and (e) of the Revenue Act of 1924 are inconsistent with the departmental construction. Section 303 (d) provided that "stock in a domestic corporation owned and held by a nonresident decedent shall be deemed property within the United States". Respondents point to the absence of a similar provision as to bonds and as to stock in foreign corporations and invoke the maxim *expressio unius est exclusio alterius.* But the argument seems to prove too much. It is not to be supposed that the Congress intended that stock owned by a nonresident in a domestic corporation, where the certificates of stock were held in the United States, were to be subject to the tax, and that bonds of the same corporation similarly owned and physically in the United States, were to be excepted. See T. D. 2530. We think that the Government's construction of the provision is the more reasonable one, that the place where the stock was held was not an element in the application of section 303 (d), and that this provision was designed to insure the inclusion of the stock of a domestic corporation in all cases whether the certificates were physically present in the United States or not. Compare *Corry* v. *Baltimore,* 196 U. S. 466, 473, 474.

Section 303 (e) provided: "The amount receivable as insurance upon the life of a nonresident decedent, and any moneys deposited with any person carrying on the banking business, by or for a nonresident decedent who was not engaged in business in the United States at the time of his death", are not to be deemed "property within the United States." The Revenue Act of 1918 (sec. 403 (b) (3)) had provided that the amount receivable as insurance, where the insurer is a domestic corporation, should be regarded as property within the United States, and this was repealed by the substituted provision of the Revenue Act of 1921 (sec. 403 (b) (3)) to the contrary effect, the latter being carried forward in the Revenue Act of 1924. It is a matter of common knowledge that American life insurance companies were engaged in business abroad, and no clear inference with respect to the question now under consideration may be drawn either from the original provision or from its repeal.[4] But the significance of the remaining clause of the Act of 1921, reenacted in 1924, is apparent. This provided for the exclusion from the gross estate of bank deposits in this country, in the circumstances stated,—deposits which, as constituting property of nonresidents situated in the United States, had theretofore been subject to the estate tax.[5] The Congress evidently thought it necessary to make this express exception, in order to exclude such deposits from the tax, but did not provide any exception with respect to bonds and certificates of stock physically here.

As to decedent's deposit balance in the instant case, the Board of Tax Appeals did not make an explicit finding that Lawrence Turnure & Company, with whom the decedent had a checking account, was "carrying on the banking business". The Board thought that the point was not material. 22 B. T. A. p. 87. If that firm was engaged in the banking business, the statute required the exclusion of the deposit balance from the gross estate. As to the securities, in view of the legislative history and departmental construction, we find no basis for holding that the statute, if valid in this application, did not require their inclusion.

Second. The question of power to lay the tax. As a nation with all the attributes of sovereignty, the United States is vested with all the powers of government necessary to maintain an effec-

[4]See House Rep. No. 767, 65th Cong., 2d Sess., p. 22; Sen. Rep. No. 275, 67th Cong., 1st sess., p. 25; House Rep. No. 350, 67th Cong., 1st sess., p. 15.

[5]See Sen. Rep. No. 275, 67th Cong., 1st sess., p. 25.

tive control of international relations. *Fong Yue Ting* v. *United States*, 149 U. S. 698, 711; *Knox* v. *Lee*, 12 Wall. 457, 555, 556. "We should hesitate long", we said in *Mackenzie* v. *Hare*, 239 U. S. 299, 311, "before limiting or embarrassing such powers". So far as our relation to other nations is concerned, and apart from any self-imposed constitutional restriction, we cannot fail to regard the property in question as being within the jurisdiction of the United States,—that is, it was property within the reach of the power which the United States by virtue of its sovereignty could exercise as against other nations and their subjects without violating any established principle of international law. This view of the scope of the sovereign power in the matter of the taxation of securities physically within the territorial limits of the sovereign is sustained by high authority and is a postulate of legislative action in other countries. The subject was considered by the House of Lords in *Winans* v. *Attorney-General*, [1910] A. C. 27. The question was as to the liability to estate duty, under the British Finance Act, 1894, of bonds and certificates when these were physically situated in the United Kingdom at the death of the owner, who was a citizen of the United States and domiciled here. The securities were payable to bearer, marketable on the London Stock Exchange, and passed by delivery. The executors insisted that "the property did not pass by the law of the United Kingdom but by the law of the deceased's domicile"; that "the presence in the United Kingdom of the documents of title to the property did not create a liability to estate duty"; that "all the debtors on the bonds and certificates were at the time of the death and all material times outside the United Kingdom and beyond its jurisdiction"; that "the marketability of a piece of paper in the United Kingdom was not sufficient to make the debt of which it was evidence liable to estate duty"; and that "the property was not situate in the United Kingdom". The House of Lords was not convinced by these contentions. The Lord Chancellor observed that "the property received the full protection of British laws—which is a constant basis of taxation—and can only be transferred from the deceased to other persons by the authority of a British Court". *Id.*, p. 30. Lord Atkinson referred to the status of the securities under international law. "Being physically situated in England at the time of their owner's death", said his Lordship, "they were subject to English law and the jurisdiction of English Courts,

and taxes might therefore *prima facie* be leviable upon them. . . . There does not appear, a priori, to be anything contrary to the principles of international law, or hurtful to the polity of nations, in a State's taxing property physically situated within its borders, wherever its owner may have been domiciled at the time of his death". *Id.*, p. 31. And Lord Shaw of Dunfermline summed up the application of the British acts as follows: "In the case of an English citizen all his property 'wheresoever situate,' subject to the exception in the Act, is aggregated, and into that aggregation—to confine oneself to the matter in hand—all personal property situate out of the United Kingdom must come, unless legacy or succession duty would not have been payable in respect thereof. In the case of the foreign citizen no taxation, of course, falls, except upon property situate within the United Kingdom, and I know no reason either under the law of nations, by the custom of nations, or in the nature of things why property within the jurisdiction of this country, possessed and held under the protection of its laws, should not, upon transfer from the dead to the living, pay the same toll which would have been paid by property enjoying the same protection but owned by a deceased British subject". *Id.*, pp. 47, 48. In this view, the securities were held to be subject to the estate duty.[6]

In *Disconto-Gesellschaft* v. *United States Steel Corporation*, 267 U. S. 22, a somewhat analogous question of jurisdiction arose in relation to the title to shares of stock of an American corporation, which were owned by German corporations, and the certificates of which had been seized in London by the British Public Trustee appointed to be custodian of enemy property during the late war. As was found to be usual with shares which it was desired to deal in abroad, the shares had been registered on the books of the American corporation in the name of an English broker or dealer who had endorsed the certificates in blank. The German corporations had bought the shares and held the certificates in London. Their suit here was to establish title, to cancel outstanding certificates and to have new certificates issued to them. They based their claim on the proposition that seizure of the certificates in

[6]See, also, as to taxation in Italy, U. S. Department of Commerce's pamphlet entitled "Taxation of Business in Italy, Trade Promotion Series—No. 82 (1929); sub tit. "Tax on Successions", p. 105; as to taxation in France, see "French Fiscal Legislation", Neurrisse and Bezoz (1928), pp. 151-153.

Great Britain did not constitute a seizure of the shares; that the presence of the certificates did not bring the shares within the territorial jurisdiction of Great Britain. This Court took a different view and sustained the title of the British Public Trustee. The Court thus stated the basis of its ruling: "New Jersey having authorized this corporation like others to issue certificates that so far represent the stock that ordinarily at least no one can get the benefits of ownership except through and by means of the paper, it recognizes as owner anyone to whom the person declared by the paper to be owner has transferred it by the indorsement provided for, wherever it takes place. It allows an indorsement in blank, and by its law as well as by the law of England an indorsement in blank authorizes anyone who is the lawful owner of the paper to write in a name, and thereby entitle the person so named to demand registration as owner in his turn upon the corporation's books. But the question who is the owner of the paper depends upon the law of the place where the paper is. It does not depend upon the holder's having given value or taking without notice of outstanding claims but upon the things done being sufficient by the law of the place to transfer the title. An execution locally valid is as effectual as an ordinary purchase. *Yazoo & Mississippi Valley R. R. Co.* v. *Clarksdale*, 257 U. S. 10. The things done in England transferred the title to the Public Trustee by English law". The Court thought it "so plain that the Public Trustee got a title good as against the plaintiffs by the original seizure" that it was deemed unnecessary to advert to the treaties upon which the Public Trustee also relied or upon the subsequent dealings between England and Germany. *Id.*, pp. 28, 29.

As jurisdiction may exist in more than one government, that is, jurisdiction based on distinct grounds—the citizenship of the owner, his domicile, the source of income, the situs of the property—efforts have been made to preclude multiple taxation through the negotiation of appropriate international conventions. These endeavors, however, have proceeded upon express or implied recognition, and not in denial, of the sovereign taxing power as exerted by governments in the exercise of jurisdiction upon any one of these grounds. For many years this subject has been under consideration by international committees of experts and drafts of conventions have been proposed, the advantages of which lie in the mutual concessions or reciprocal restrictions to be voluntarily

made or accepted by Powers freely negotiating on the basis of recognized principles of jurisdiction.[7] In its international relations, the United States is as competent as other nations to enter into such negotiations, and to become a party to such conventions, without any disadvantage due to limitation of its sovereign power, unless that limitation is necessarily found to be imposed by its own Constitution.

Respondents urge that constitutional restriction precluding the Federal estate tax in question is found in the due process clause of the Fifth Amendment. The point, being solely one of jurisdiction to tax, involves none of the other considerations raised by confiscatory or arbitrary legislation inconsistent with the fundamental conceptions of justice which are embodied in the due process clause for the protection of life, liberty and property of all persons—citizens and friendly aliens alike. *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481, 489; *Nichols* v. *Coolidge*, 274 U. S. 531, 542; *Heiner* v. *Donnan*, 285 U. S. 312, 326. If in the instant case the Federal Government had jurisdiction to impose the tax, there is manifestly no ground for assailing it. *Knowlton* v. *Moore*, 178 U. S. 41, 109; *McCray* v. *United States*, 195 U. S. 27, 61; *Flint* v. *Stone Tracy Co.*, 270 U. S. 107, 153, 154; *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1, 24; *United States* v. *Doremus*, 249 U. S. 86, 93. Respondents' reliance is upon the decisions of this Court with respect to the limitation of the taxing power of the States under the due process clause of the Fourteenth Amendment. *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204; *Baldwin* v. *Missouri*, 281 U. S. 586; *Beidler* v. *South Carolina Tax Commission*, 282 U. S. 1; *First National Bank of Boston* v. *Maine*, 284 U. S. 312. They insist that the like clause of the Fifth Amendment imposes a corresponding restriction upon the taxing power of the Federal Government.

The argument is specious, but it ignores an established distinction. Due process requires that the limits of jurisdiction shall not

[7]Publication entitled "*Double Taxation Relief*", Bureau of Foreign and Domestic Commerce, Department of Commerce (January, 1928), pp. 20, 21; "*Double Taxation and Tax Evasion*", Report of the General Meeting of Government Experts to League of Nations, Document C. 562, M. 178, 1928, II, 49, pp. 22-24; Fifth General Congress, International Chamber of Commerce, Amsterdam, 1929, Resolution No. 1, Annex, p. 11; Washington Congress, 1931, International Chamber of Commerce, Resolution No. 10, pp. 20-22. See also, "*Taxation of Foreign and National Enterprises*", (League of Nations, Geneva, 1932).

be transgressed. That requirement leaves the limits of jurisdiction to be ascertained in each case with appropriate regard to the distinct spheres of activity of State and Nation. The limits of State power are defined in view of the relation of the States to each other in the Federal Union. The bond of the Constitution qualifies their jurisdiction. This is the principle which underlies the decisions cited by respondents. These decisions established that proper regard for the relation of the States in our system required that the property under consideration should be taxed in only one State and that jurisdiction to tax was restricted accordingly. In *Farmers Loan & Trust Company* v. *Minnesota, supra,* the Court applied the principle to intangibles, and referring to the contrary view which had prevailed, said (p. 209): "The inevitable tendency of that view is to disturb good relations among the States and produce the kind of discontent expected to subside after establishment of the Union. The Federalist, No. VII. The practical effect of it has been bad; perhaps two-thirds of the States have endeavored to avoid the evil by resorting to reciprocal exemption laws." It was this "rule of immunity from taxation by more than one State," deducible from the decisions in respect of various and distinct kinds of property, that the Court applied in *First National Bank* v. *Maine, supra,* p. 326.

As pointed out in the opinion in the *First National Bank* case, the principle has had a progressive application. In *Louisville & Jeffersonville Ferry Company* v. *Kentucky*, 188 U. S. 385, the question related to a ferry franchise granted by Indiana to a Kentucky corporation which Kentucky attempted to tax. Despite the fact that the tax was laid upon a property right belonging to a domestic corporation, the Court held that the Fourteenth Amendment precluded the imposition. *Id.*, p. 398. In *Union Refrigerator Transit Company* v. *Kentucky*, 199 U. S. 194, the principle was applied to the attempted taxation by Kentucky of tangible personal property which was owned by a domestic corporation but had a permanent situs in another State. The Court decided that where tangible personal property had an actual situs in a particular State, the power to subject it to state taxation rested exclusively in that State regardless of the domicile of the owner. By *Frick* v. *Pennsylvania*, 268 U. S. 473, the rule became definitely fixed that as to tangible personal property the power to impose a death transfer tax was solely in the State where the property had an actual situs, and could not be exercised by another State where

the decedent was domiciled. See *First National Bank* v. *Maine, supra,* p. 322. The decision in *Farmers Loan & Trust Company* v. *Minnesota, supra,* overruling *Blackstone* v. *Miller,* 188 U. S. 189, carried forward the principle by applying it to intangibles. The Court was of the opinion that "the general reasons declared sufficient to inhibit taxation of them [tangibles] by two States apply under present circumstances with no less force to intangibles with taxable situs imposed by due application of the legal fiction. Primitive conditions have passed; business is now transacted on a national scale. A very large part of the conutry's wealth is invested in negotiable securities whose protection against discrimination, unjust and oppressive taxation is matter of the greatest moment". 280 U. S. pp. 211, 212.

But it has been as decisively maintained that this principle, thus progressively applied in limiting the jurisdiction of the States to tax, does not restrict the taxing power of the Federal Government. The distinction was clearly and definitely made in *United States* v. *Bennett,* 232 U. S. 299. The question arose under section 37 of the Tariff Act of August 5, 1909, 36 Stat. 112, imposing a tax upon the use of foreign built yachts, owned or chartered by citizens of the United States. The levy of the tax with respect to a yacht owned by a citizen of the United States, domiciled here, but which was not used within the jurisdiction of the United States and had its permanent situs in a foreign country, was resisted under the due process clause of the Fifth Amendment. The objector invoked the doctrine, already established, which denied to a State, under the Fourteenth Amendment, jurisdiction to tax personal property which had a permanent situs in another State. *Union Refrigerator Transit Company* v. *Kentucky, supra.* Under that doctrine, as we have seen, it made no difference that the owner of the property was a citizen of, or domiciled in, the State which attempted to lay the tax. The argument was pressed that the Federal statute should not be so construed as to apply to the use of a yacht wholly beyond the territorial limits of the United States since if so interpreted it would be repugnant to the Constitution. But the Court thought that to apply that rule of interpretation would be to cause "an imaginary doubt" as to the constitutionality of the statute, and would render it necessary to give the statute "a wholly fictitious and unauthorized meaning". We found nothing "of such gravity in the asserted constitutional question" as to justify departing from the evident legislative intention.

Speaking through Chief Justice White, and fully recognizing the principle applicable to the taxing power of the States, the Court observed that the argument involved a misapprehension, not as to what had actually been decided, but "in taking for granted that because the doctrine stated has been applied and enforced in many decisions with respect to the taxing power of the States, that the same principle is applicable to and controlling as to the United States in the exercise of its powers." "The confusion results"—the Court continued—"from not observing that the rule applied in the cases relied upon to many forms of exertion of state taxing power is based on the limitations on state authority to tax resulting from the distribution of powers ordained by the Constitution. In other words, the whole argument proceeds upon the mistaken supposition, which is sometimes indulged in, that the calling into being of the government under the Constitution, had the effect of destroying obvious powers of government instead of preserving and distributing such powers. The application to the States of the rule of due process relied upon comes from the fact that their spheres of activity are enforced and protected by the Constitution and therefore it is impossible for one State to reach out and tax property in another without violating the Constitution, for where the power of the one ends the authority of the other begins". "But this", the Court added, "has no application to the Government of the United States so far as its admitted taxing power is concerned", for that power "embraces all the attributes which appertain to sovereignty in the fullest sense. . . . Because the limitations of the Constitution are barriers bordering the States and preventing them from transcending the limits of their authority and thus destroying the rights of other States and at the same time saving their rights from destruction by the other States, in other words of maintaining and preserving the rights of all the States, affords no ground for constructing an imaginary constitutional barrier around the exterior confines of the United States for the purpose of shutting that government off from the exertion of powers which inherently belong to it by virtue of its sovereignty". *Id.*, pp. 305, 306.

This distinction between the limitations of state jurisdiction to tax and the broad authority of the Federal Government, was restated and applied in *Cook* v. *Tait*, 265 U. S. 47, 55, 56, and was again explicitly recognized in *Frick* v. *Pennsylvania, supra*, p. 491.

The distinction cannot be regarded as limited to tangible property. It has equal application to intangibles. It does not rest upon the question whether the property is of the one sort or the other, but upon the fact that the limitation of state jurisdiction to tax does not establish the limitation of Federal jurisdiction to tax. If the Federal Government may rest its jurisdiction to lay its tax upon the fact of the citizenship and domicile in this country of the owner of tangible property, wherever that property may be situated, although the State may not impose a like tax with respect to property having a permanent location outside the State, the Federal Government cannot be regarded as restrained in its power to tax securities owned by a non-resident, but physically in this country, merely because the State is debarred from laying such a tax with respect to a non-resident of the State. The decisive point is that the criterion of state taxing power by virtue of the relation of the States to each other under the Constitution is not the criterion of the taxing power of the United States by virtue of its sovereignty in relation to the property of non-residents. The Constitution creates no such relation between the United States and foreign countries as it creates between the States themselves.

Accordingly, in what has been said, we in no way limit the authority of our decisions as to state power. We determine national power in relation to other countries and their subjects by applying the principles of jurisdiction recognized in international relations. Applying those principles we cannot doubt that the Congress had the power to enact the statute, as we have construed and applied it to the property in question. The securities should be included in the gross estate of the decedent; the inclusion of the balance of the cash deposit will depend, under the statute, upon the finding to be made with respect to the nature of the business of the concern with which the deposit was made.

The judgment is reversed and the cause is remanded for further proceedings in conformity with this opinion.

It is so ordered.

Mr. Justice BUTLER is of opinion that the statute does not extend to the transfer of the foreign or other securities effected by the death of decedent, Ernest Augustus Brooks, a British subject resident of and dying in Cuba, and that the conclusions of the Board of Tax Appeals and Circuit Court of Appeals are right and should be affirmed.